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INDIANA REPORTS.

VOLUME XXXVII.

Stereotyped by
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Nov 21

32

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES CITED
AND AN INDEX.

BY JAMES B. BLACK,
OFFICIAL REPORTER.

VOL. XXXVII.

CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1871.

INDIANAPOLIS:
JOURNAL COMPANY, PRINTERS AND BINDERS.
1873.

Dec. July 16, 1873

Entered, according to the act of Congress, in the year 1873, by
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JUDGES
OF THE
SUPREME COURT OF JUDICATURE
DURING THE TIME OF THESE REPORTS.

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JOHN PETTIT, LL. D.

ALEXANDER C. DOWNEY, LL. D.

***Chief Justice at the November Term, 1871.**

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1871, IN THE FIFTY-SIXTH
YEAR OF THE STATE.

FRENZEL ET AL. *v.* MILLER.

FRAUDULENT REPRESENTATIONS.—A. sued F. & H. upon two promissory notes.

F. & H. answered, first, that the consideration of the notes was the purchase of a certain mill, with engine, boiler, and machinery from V., who was the payee of the notes and had transferred them to the plaintiff; that V. fraudulently and falsely represented that the boiler, engine, and machinery were in good condition, sound, and fit for the running of the mill, and defendants, relying on said representations, purchased; that V. knew the representations were false; that, in fact, said boiler and machinery were worthless, but they could not discover this fact by ordinary diligence, and they were required to expend large sums in repairs, and the mill was kept idle in undergoing repairs on account of defects.

Held, that this answer was good on demurrer.

SAME.—*Warranty.*—A second paragraph of answer contained the same allegations as the first, with an averment of a warranty.

Held, that this was a sufficient answer.

PROMISSORY NOTE.—*Assignment.*—*Party in Interest.*—Another paragraph of answer alleged that the plaintiff was not the real party in interest, the assignment being made to cheat the defendants.

Held, that this answer was bad.

SAME.—*Bankrupt Law.*—*Fraud.*—Another paragraph of answer averred: that the assignment was made in fraud of the bankrupt law.

Held, that this answer was not good on demurrer.

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CONTRACT WITH CO-DEFENDANT.—*Set-off*.—Another paragraph of answer was that F. agreed with his co-defendant H. to pay the notes and save him harmless, and that the plaintiff was indebted to him for goods sold.

Held, that this was not a sufficient answer.

EVIDENCE.—*Damages*.—On the trial, the court excluded evidence of damages sustained by loss of time while the mill was undergoing repairs in machinery, of defects which existed at the date of sale.

Held, that the evidence should have been admitted.

SAME.—*False Representations*.—*Knowledge*.—The court allowed evidence of the want of knowledge by V. and A. of the falsehood of the representations made, one of the paragraphs of answer having charged that A, the plaintiff, united with V. in the fraudulent representations.

Held, that if the evidence had been admissible under the answers alleging fraud, the court should have instructed the jury that such testimony could not be considered in determining whether there had been a warranty and a breach thereof.

SAME.—*Cross Examination*.—On the trial, the plaintiff introduced a witness who testified that the mill was in the same condition a short time before the sale, as it had been for over three years previous thereto. The defendants offered then, on cross examination, to prove that the machinery was worthless three years before said sale. The court refused the evidence.

Held, that this was error, as the evidence offered was proper, on cross examination, as a means of testing the knowledge of the witness, and for the purpose of explaining his testimony in chief.

INSTRUCTION.—*Notice of Assignment*.—The court instructed the jury that a set-off, set up in answer, could not be allowed unless it accrued before the assignment of the notes.

Held, that this was error; that the instruction should have been that the set-off must have accrued before notice to defendants of the assignment.

SAME.—*False Representation*.—*Knowledge*.—The court instructed the jury that fraudulent representations, to relieve a party from his contract, must be false, and the intent, when they were uttered, must have been to deceive, and they must have been intended to operate on the party complaining; and the court refused to instruct that if the representations were false and relied upon to the defendant's damage, they constituted a defence, although not known to be false by V. when he made them.

Held, that the instruction given should have been refused, and the one refused given.

SAME.—*Silence*.—An instruction was asked and refused, that if V. knew that the machinery was out of order, and that this could not be discovered by ordinary care, and that the defendants believed the machinery was in good order, the silence of V. would amount to a representation.

Held, that this instruction was correctly refused.

APPEAL from the Ripley Common Pleas.

BUSKIRK, J.—The appellee sued the appellants upon two

Frenzel et al. v. Miller.

notes, executed by Joseph Frenzel and Henry Harderback, on the 21st of December, 1863, payable to Alexis Voltz on the first days of January 1865 and 1866, for one thousand two hundred and fifty dollars each, and to obtain a foreclosure of a mortgage executed by the said Frenzel and Harderback and their wives to secure the payment of the said notes. The notes and mortgage were assigned by the payee to the plaintiff below.

The appellants answered in nine paragraphs. The first was in the nature of a counter claim. It was alleged, in substance, that the notes sued on were given in part consideration for the real estate described in the mortgage, and the engine, boiler, and machinery of a saw and grist mill thereon situate, which they purchased of the said Voltz at the date of the said notes; that the said Voltz, at the time of the said sale, falsely and fraudulently represented to the defendants that the said engine, boiler, and machinery in the said mill were in good condition, sound and fit for the purpose for which they were intended, and were in good running order; that the defendants, in reliance upon the said false and fraudulent representations as true, made the said purchase; that the said boiler was burned out and dangerous to run, and was valueless, except as old iron, all of which was well known to the said Voltz, and was unknown to the defendants, and that such defects could not have been discovered by ordinary diligence; that after the purchase of the said mill, the said defendants were compelled to sell the said boiler and machinery for old iron; that the said boiler, in the condition that it was in at the time of the said sale, was only worth one hundred dollars, and if it had been in the condition as represented, it would have been worth two thousand dollars; that the engine and machinery of the said mill were out of repair, not sound or in good running order; that the defendants were compelled to, and did, expend one hundred and seventy dollars to put the said machinery in running order; that by reason of the defects in the said engine and boiler, they were put to the expense

of two hundred dollars in removing the same and in replacing them with others; and that by reason of such defects the defendants lost the use of said mill for sixty-five days, which was reasonably worth seven hundred and eighty dollars, for all of which they claim damage in the sum of two thousand dollars.

The second was the same as the first, except it was alleged that Voltz had warranted that the engine, boiler, and machinery were sound, in good condition, and in good running order, and the breach of the warranty and the damages sustained thereby were set out in the same manner as in the first paragraph.

The third was a set-off. In this it was alleged that prior to the assignment and before notice thereof the payee of the said notes was indebted to the defendant Frenzel, as per bill of particulars filed, and that when such indebtedness was created it was understood and agreed that the same should be credited upon the said notes.

The fourth paragraph alleges that the plaintiff was not the real party in interest, for the reason that he took the assignment of the said notes and held the same for the fraudulent purpose of cheating and defrauding the creditors of the said Voltz.

The fifth alleges that the plaintiff took the assignment of the said notes on the 1st of July, 1867, when Voltz was in failing circumstances, and in fraud of the bankrupt law of the United States, as the assignment was made to prefer his creditors.

The sixth alleges that the defendant Frenzel agreed with his co-defendant, Harderback, to pay off the notes sued on and save him harmless, and that the plaintiff was indebted to him in the sum of seventy-seven dollars and forty-six cents for goods and merchandise sold and delivered, as per bill of particulars filed.

The seventh paragraph alleges that the defendants, on the 7th of January, 1864, purchased of Voltz, the payee of said notes, the real estate, mill, and machinery mentioned in the

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complaint for the sum of three thousand five hundred dollars; that one thousand dollars was paid down at the time of the purchase, and the notes sued on were given; that before notice of the assignment and the commencement of the action, the defendants paid to the said Voltz one thousand dollars on the said notes; that at the time of making the said purchase, the said plaintiff and the said Voltz falsely and fraudulently represented that the said mill and machinery were sound, in good condition, and in good running order, when in truth and in fact, the said engine, boiler, and machinery were old, worn out, and worthless, of which the defendants were ignorant, and placed special confidence and reliance in the representations so made as aforesaid; that the said plaintiff and Voltz combined and confederated together to cheat and defraud the defendants, and, to induce them to make said purchase, falsely and fraudulently represented that the said mill and machinery were in good order, when in truth the same were worn out and worthless, and the defendants were compelled to, and did, expend the sum of four thousand dollars in purchasing new machinery, and in putting the same in good order, and that by reason of such defects they lost the use of the mill sixty-five days, the reasonable use whereof would have been seven hundred and eighty dollars. The paragraph prays that Voltz be made a party, and that they recover judgment for three thousand dollars.

The eighth paragraph alleged that before the assignment of the notes they had been paid in full.

The ninth paragraph contains the same allegations as the first, with the additional averments that the defendants resided twenty-four miles from the said mill; that the said Voltz agreed to run and operate the said mill, and avoided doing so by falsely pretending that the hired hands would not work; that the said boiler was walled up so that it could not be examined, and that the said defects could not have been discovered by ordinary diligence, and demanded judgment, etc.

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There were demurrers to all the paragraphs of the answer, except the eighth and ninth, which were sustained to the first, fourth, fifth, sixth, and seventh, and overruled as to the second and third paragraphs, and exceptions were taken to sustaining the demurrers.

The plaintiff replied to the second, third, and ninth paragraphs of the answers in two paragraphs: first, general denial; second, that after the plaintiff got the notes in suit, defendants said they were all right, and they would pay them after they had run said mill and found out the quality and condition of the engine, boiler, and fixtures; wherefore they ought to be estopped.

There was a motion made and overruled to strike out the second paragraph of reply, and an exception was taken; but the question is not reserved by bill of exceptions, and no cross errors are assigned. There was a trial by jury, resulting in a verdict for plaintiff of one thousand six hundred and eighty-two dollars and ninety-four cents.

The court overruled a motion for a new trial and rendered judgment on the verdict.

The errors assigned are: first, in sustaining demurrers to the first, fourth, fifth, sixth, and seventh paragraphs of the answer; second, in overruling evidence offered to prove the value of the mill while the same was idle; third, in permitting plaintiff and Voltz to testify that they did not know of the defects in the machinery; fourth, in permitting Newhouse to testify as to the condition of the mill and machinery three years before the sale; fifth, in giving instructions one, twelve, and seventeen, as requested by plaintiff; sixth, in refusing charges one and two, as requested by defendants; seventh, in overruling motion for a new trial.

We think that the first and seventh paragraphs of the answer were good, and that the court erred in sustaining a demurrer to them. We are of the opinion that the fourth, fifth, and sixth paragraphs of the answer were bad, and that the court committed no error in sustaining the demurrer to them.

We are of the opinion that the court erred in excluding the evidence offered by the defendants to prove the amount of damage they had sustained by reason of the mill being unemployed while undergoing repairs for defects that existed at the time of the sale. See *Griffin v. Colver*, 16 N. Y. 489; *Page v. Ford*, 12 Ind. 46; *Fultz v. Wycoff*, 25 Ind. 321; *Overbay's Adm'r v. Lighty*, 27. Ind. 27.

We are of the opinion that the court erred in permitting the plaintiff and Voltz to testify that they did not know of the defects in the mill and machinery at the time they made the representations. The second paragraph of the answer set up a warranty, and under that, the defendants were not required to prove that the warranty had been fraudulently made. When we come to consider the instructions given and refused, we will determine whether such proof had to be made under the answers alleging that the representations had been falsely and fraudulently made. But if the evidence was admissible under the answers alleging fraud, the court should have instructed the jury that such testimony should not be considered in determining whether there had been a warranty and a breach thereof.

August Newhouse was examined by plaintiff and testified that he had first known the mill three and one-half years before purchase by defendants, and up to one year before the sale; that he had examined it in the fall of 1863, with the view of purchasing it, and found it in about the same condition as when he had formerly known it. Upon cross examination the defendants offered to prove by him that the boiler and engine were worn out and defective three years before their purchase, to which plaintiff objected on the ground that the defendants had closed their evidence, and that this evidence was not proper upon cross examination. The objection was sustained and the evidence excluded, to which ruling the defendants excepted. We are of the opinion that the court erred in excluding the evidence. We think that the evidence was proper upon cross examination, as a means of testing the extent and accuracy of the knowledge of the

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witness in reference to the condition of the mill and machinery, and especially for the purpose of explaining his statement upon his examination in chief, that the mill was, in the fall of 1863, in about the same condition that it was three years before. See *Adams v. Dale*, 29 Ind. 273; *Huckleberry v. Riddle*, 29 Ind. 454; *Davis v. The State*, 35 Ind. 496.

The first instruction given by the court does not contain a full and accurate statement of the law as to what defects will not be reached and covered by a warranty, but the law was correctly stated in subsequent instructions.

The appellants complain of the giving of the twelfth instruction, which was in these words: "In order to make the set-off pleaded of claims against Voltz, the defendants must show that the indebtedness accrued before the assignment of the notes to Miller, and in addition to that, that there was a contract and agreement between Frenzel and Voltz that the same should go as a credit on these notes."

We are clearly of the opinion that the court erred in giving this instruction. The jury were told that to entitle the defendants to a set-off, it must be shown that the indebtedness had accrued prior to the assignment of the notes. This was wrong. If the assignee of a note desires to protect himself against a set-off against the original payee and assignor, he should give notice of such assignment to the makers. Our statute provides that the maker of a note shall have against the assignee the same defence that he would have against the original payee, and that all actions by assignees shall be without prejudice to a set-off or other defence existing at the time of or before notice of the assignment. 2 G. & H. 38, sec. 6; *Goldthwait v. Bradford*, 36 Ind. 149.

The appellants insist that the court erred in giving the seventeenth instruction, and in refusing to give the first instruction, as asked by them. As the instructions given and those refused are in direct opposition, we will consider them together.

The seventeenth instruction was as follows: "Fraudulent representations, to relieve a party from his contract, must be

false, and the intention, when they were uttered, must have been to deceive. And they must have been intended to operate on the party complaining."

The first instruction asked by the defendants, and refused by the court, was as follows: "If the jury find that Voltz, at the time of and before the sale, made the representations charged by the defendants, and the defendants, relying upon such representations, purchased the mill, believing them to be true, and if such representations proved to be false, to the defendants' damage, then defendants are entitled to damages on their answer, notwithstanding Voltz did not know that what he said was false."

It is maintained by the appellee that the instruction given by the court was correct, and in support of his position he refers to, and relies upon the case of *Zehner v. Kepler*, 16 Ind. 290, and the authorities therein cited.

It is maintained by the appellants that the instruction given was wrong, and the one asked and refused was correct, and in support of these positions reference is made to the case of *Woodruff v. Garner*, 27 Ind. 4, and the authorities therein referred to.

The rulings in the two principal cases are in conflict. We propose to examine these cases and the authorities cited in support of them, and other English and American cases, with the view of ascertaining the correct rule on the subject.

The case of *Zehner v. Kepler* was an action upon a note, and for money had and received. The defendant, among other things, pleaded "that the note was given for a horse, and at the time of the sale the horse was unsound and crippled, etc., which was well known to Starr, the payee and assignee of the note, and that Starr falsely and fraudulently represented to Zehner that the horse was sound, and fraudulently concealed the unsoundness."

The sixth instruction, so far as it relates to the question under consideration, was as follows:

"6. In the third clause of the defendants' answer, they allege that the plaintiff made certain false and fraudulent rep-

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representations about the horse. A fraudulent representation, to entitle a party to defend successfully, must be false, and known to be false by the seller at the time it was made, and be about a material part of the contract, and be relied on by the buyer."

This court says: "The sixth charge, above set out, is claimed to be erroneous, because the jury were advised that the false representations, in order to be available as a defence, must have been known to be false by the party making them. It is claimed that they were 'equally a fraud, whether known to be false or not; the individual who asserts a thing ought to know it to be true and ought to make it good.'

"The law in this respect, as laid down in the charge given, is beyond doubt, as a general rule, correct. Thus, it is said by an elementary writer: 'If the representation is not known to be false by the utterer of it, or be not used with intent to deceive, it will not amount to fraud, although really false.' Smith Cont. 152.

"Again. 'But the misrepresentation of a fact known by the party making the statement to be untrue, amounts to a fraud in law, if the misrepresentation be naturally calculated, or be expressly intended, to induce a person to act thereon so that he may be prejudiced.' Chitty Cont. 683. See, also, Greenl. Ev., sec. 230; 4 Stephen Nisi Prius, 1284, 1286; *Stanley v. Norris*, 4 Blackf. 353; *Humphreys v. Comline*, 8 *id.* 516; *The State Bank v. Hamilton*, 2 Ind. 457. There may be, and probably are, cases which form exceptions to the general rule thus stated, cases where a party may rescind a contract for false representations not known to be false by the party making them. See *Gatling v. Newell*, 9 Ind. 572."

In *Stanley v. Norris*, *supra*, this court says: "The action now before us is not founded, as the court supposes, upon a warranty that the horse was sound. The *gravamen* of the suit is the fraud of the defendant in falsely representing the horse to be sound, when he knew him to be unsound. It is the defendant's knowledge of the falsity of the representation, upon which the plaintiff in his declaration depends;

and, without proof of that knowledge, this action cannot be sustained."

In *Humphreys v. Comline, supra*, this court says: "Though there is some evidence proper for consideration in a question of this kind, there is not enough clearly to establish the fact that the representations made by Comline at the time of the sale were fraudulent. It should have been shown that they were not only false, but known to have been so by him at the time they were made."

This court in *State Bank v. Hamilton, supra*, says: "Since the case of *Pasley v. Freeman*, 3 Term R. 51, it is well established that such representations, if fraudulently made, would have rendered the defendants liable. But it is equally well settled by *Haycraft v. Creasy*, 2 East, 92, and numerous subsequent decisions, that when the person making the representations was himself deceived, and had no intention to deceive others, he is not responsible for the correctness of his belief or opinions so represented, however strongly such belief or opinions may have been expressed."

We have examined the elementary books above referred to, and find that they sustain the ruling of this court in the principal case now under consideration.

The case of *Woodruff v. Garner, supra*, was an action to obtain the rescission of a contract between the parties for the exchange of lands, and of conveyance made in pursuance of the contract, upon the ground that the contract and conveyance were induced by certain specified false and fraudulent representations of the defendant, as to the facts and the law.

This court, upon the question under review, say: "The court instructed the jury that 'false and fraudulent representations,' made by the defendant to the plaintiff, upon which the latter relied in making the contract, would not avail the plaintiff in the case, unless it also appeared that the defendant, at the time of making the representations, knew them to be false. The appellant complains of this instruction. We cannot conceive of a state of the evidence, under the issues of this case, which would justify this instruction. We can

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well understand that there may be, and are, many cases in which, for the purpose of proving that false representations are fraudulent, it is necessary to show that the party who made them knew that they were false. But we know of no case where relief will be denied in equity on account of false and fraudulent representations upon which a party has relied to his injury, merely because the proof fails to show that the party who perpetrated the fraud knew that his representations were false.

“The law is thus stated by an elementary writer: ‘If the statement be in fact false, and be uttered for a fraudulent purpose, which is in fact accomplished, it has the whole effect of fraud in annulling the contract, although the person uttering the statement did not know it to be false, but believed it to be true.’ 2 Pars. Con. 775. The following cases are to the same effect: *Taylor v. Ashton*, 11 M. & W. 401; *Warner v. Daniels*, 1 Woodb. & Min. 90; *Ainslie v. Medlycott*, 9 Ves. 13; *Shackleford v. Haudley*, 1 A. K. Marsh. 500; *Munroe v. Pritchett*, 16 Ala. 785. Nor are we without authority of like character in Indiana. *McCormick v. Malin*, 5 Blackf. 509, is directly to the point.”

PARKE, B., in delivering the opinion of the Court of Exchequer in the case of *Taylor v. Ashton*, states the law thus:

“From this proposition we entirely dissent, because we are of opinion, that independently of any contract between the parties, no one can be made responsible for a representation of this kind, unless it be fraudulently made. That is the doctrine laid down in *Pasley v. Freeman*, where, for the first time, the cases on this subject were considered. In that case Mr. Justice GROSE differed from the rest of the court, and thought the law gave no remedy for fraud, unless there was a contract between the parties. The court, however, held, that if a person told that which was untrue, and told it for a fraudulent purpose, and with the intention to induce another to do an act, and that act was done to the prejudice of the plaintiff, then an action for fraud would lie. That case was followed by *Haycraft v. Creasy*, and a great variety of other

cases, and it must now be considered as established law. But then it was said, that in order to constitute that fraud, it was not necessary to show that the defendants knew the fact they stated to be untrue; that it was enough that the fact was untrue, if they communicated that fact for a deceitful purpose; and to that proposition the court is prepared to assent. It is not necessary to show that the defendants knew the fact to be untrue. If they stated a fact which was true for a fraudulent purpose, they at the time not believing that fact to be true, in that case it would be both a legal and moral fraud."

Sir WILLIAM GRANT, the Master of the Rolls, in delivering the opinion of the high court of chancery, in *Ainslie v. Medlycott*, *supra*, said: "No doubt, by a representation, a party may bind himself just as much as by an express covenant. If, knowingly, he represents what is not true, no doubt he is bound. If without knowing that it is not true, he takes upon himself to make a representation to another, upon the faith of which that other acts, no doubt he is bound, though his mistake was perfectly innocent."

In the case of *M'Ferran v. Taylor*, 3 Cranch, 281, the Supreme Court of the United States, after remarking that there was a material misrepresentation, and that the defendant had contended that it originated in mistake, not in fraud, say: "From the situation of the parties, and of the country, and from the form of the entry, it is reasonable to presume, that this apology is true in point of fact; but the court does not conceive that the fact will amount to a legal justification of the person who has made the misrepresentation. He who sells property on a description given by himself, is bound to make good that description; and if it be untrue in a material point, although the variance be occasioned by a mistake, he must still remain liable for that variance."

The same court, in *Smith v. Richards*, 13 Pet. 38, after reviewing the leading English and American cases on this subject, say:

"The principles of these cases we consider founded in

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sound morals and law. They rest upon the ground that the party selling property must be presumed to know whether the representation which he makes of it is true or false. If he knows it to be false, that is fraud of the most positive kind; but if he does not know it, then it can only be from gross negligence; and in contemplation of a court of equity, representations founded on mistake, resulting from such negligence, is fraud. 6 Ves. 180, 189. Jeremy, 385, 386. The purchaser confides in it upon the assumption that the owner knows his own property, and truly represents it; and, as was well argued in the case in Cranch, it is immaterial to the purchaser whether the misrepresentation proceeded from fraud or mistake. The injury to him is the same whatever may have been the motives of the seller."

WOODBURY, J., in *Warner v. Daniels, supra*, says:

"These, then, vitiate the transaction as representations untrue; on material points; and, if untrue by mistake, still vitiating as much by such a mistake in material matters as if there was a fraudulent design. *Daniel v. Mitchell*, 1 Story, 172. So it is the better opinion, that whether Daniels himself knew these accounts to be false or not, is immaterial, if they were false and influential. 1 Story Eq. Jur., sec. 193; *Ainslie v. Medlycott*, 9 Ves. 13; *Graves v. White*, Freem. 57; *Pearson v. Morgan*, 2 Brown Ch. C. 388."

Mr. JUSTICE STORY, in *Daniel v. Mitchell, supra*, says:

"We have said that the bill mainly proceeds upon the imputation of fraud; but its allegations are sufficient to found a claim for relief, if the bargain was made upon material representations of matters of fact, constituting the basis thereof, which are untrue, even although innocently made by the mistake of the parties, or by the mistake of the sellers alone. Nothing is more clear in equity than the doctrine that a bargain founded in a mutual mistake of the facts constituting the very basis or essence of the contract, or founded upon the representations of the sellers, material to the bargain, and constituting the essence thereof, although made by innocent mistake, will avoid it. Mistake, as well as fraud, in any rep-

resentation of a fact, material to the contract, furnishes a sufficient ground to set it aside and to declare it a nullity."

In *Juzan v. Toulmin*, 9 Ala. 662, 684, it is said:

"And whether a party misrepresenting a fact knew it to be false, or made the assertion without any precise knowledge on the subject, is immaterial; for the affirmation of what one does not know, or believe to be true, is equally in morals and law as unjustifiable as the affirmation of what is known to be positively false."

In *Munroe v. Pritchett*, 16 Ala. 785, the law is stated thus:

"From our own decisions, I think the conclusion may be deduced, that although in an action on the case to recover for the consequences resulting from a fraudulent misrepresentation of matter of fact, coming within the restrictions above laid down, the plaintiff must show that such misrepresentations were fraudulently made, yet it is not indispensable that the party making them should at the time have known them to be false. It is sufficient that he made them recklessly, not knowing them to be true, and for the purpose of influencing the other party in making the purchase. The seller, who owns the land, and who proposes selling it, must be presumed to know more about the lines, and what land is embraced within the tract, than the buyer. In that case, whether he did or did not, he assumed to know the fact that certain good land, which formed an inducement to the purchase, was included, and he asserted this as a fact, upon which the purchaser relied, and might well rely, in concluding the bargain. He thus induces the purchase, upon his false statement of matter of fact, and pockets the gains. Shall he, when sued, say, 'I did not know that I was telling an untruth?' It is sufficient that he misrepresented the fact, and did not care that he did so; in other words, that he asserted as true, and as a matter of knowledge, that which was untrue, and which he either knew nothing about, or knew to be untrue. Did the law allow the action to punish the untruth, and not as a compensation to the party injured by its consequences, then it would

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be proper to make the action depend upon the *scienter*; but the action is for the injury sustained by reason of the reckless, false assertion of the vendor, which was calculated to deceive, and did deceive, the purchaser—consequences which to him are precisely the same, whether the vendor knew, or did not know, or care to know, that the assertion was false.”

This court, in the well considered case of *M' Cormick v. Malin*, 5 Blackf. 522, says:

“Even admitting that Malin made the misrepresentation innocently by mistake—a supposition that his fair general character, perhaps, renders no more than just to him—this consideration does not prevent the application of the principle. The misrepresentation, nevertheless, took the complainant by surprise, and produced false impressions injurious to his interest. This, too, is a good cause of relief in a court of equity. 1 Story Eq. 201; *Turner v. Harvey*, Jacob, 169; 2 Br. Ch. R., cited in 1 Story Eq. 203, n. 6.”

This court, in *Shaeffer v. Sleade*, 7 Blackf. 178, says:

“It is wholly immaterial in this case to inquire whether Matlack intentionally misrepresented the amount of profits derived from exhibiting the figures or not, because if his misrepresentations were innocently made by mistake, they operated as a surprise and imposition on Sleade as much as if they had been through design. *Ainslie v. Medlycott*, 9 Ves. 21; *Pearson v Morgan*, 2 Br. Ch. R. 388; *Burrowes v. Lock*, 10 Ves. 470.”

This court, in *Reed v. Diven*, 7 Ind. 189, says:

“These representations were untrue; and whether they were the result of misapprehension or mistake, does not vary the case. In relation to this point we adopt the argument of the appellee: ‘The sheriff assumed to know the facts and gave information on the subject; but whether he knew his statements to be false or not, the effect on the sale and the interest of Diven was the same.’ They were calculated to make a false impression on the minds of bidders, and operate as a fraud upon the execution defendant.”

The subject has been by no means exhausted, but we will

make no further quotations from elementary writers or decisions. The quotations made will show the general current of authorities, and an examination of cases cited will furnish a reference to numerous other cases.

The following principles of law are fairly and logically deducible from the foregoing authorities:

1. To constitute a misrepresentation a ground of fraud for avoiding the contract, or to entitle the injured party to his action, it must be in regard to a material fact, operating as an inducement to the purchase or the making of the contract, and upon which the purchaser or person making the contract had a clear right to rely; and the party complaining must have been actually deceived thereby; and, generally, such representation must not be mere matter of opinion, or in respect of facts equally open to the observation of both parties, and concerning which the party complaining, had he exercised ordinary prudence, could have attained correct knowledge. If a party blindly trusts, where he should not, and closes his eyes, where ordinary diligence requires him to see, he is willingly deceived, and the maxim applies, *volenti non fit injuria*.

2. If a person represents a thing to be true, when he knows it to be false, he is guilty of positive fraud.

3. If a representation be made of a matter material to the contract, which turns out to be untrue, to the damage of the party to whom such representation was made, and who relied on the same as true, such representation will have the force and effect of positive fraud in a proceeding to rescind the contract, or in an action for, or defence founded on, the fraud, whether the falsity of the representation was known to the party making it or not, on the ground that he who makes a representation as true, without knowing it to be true, is guilty of gross negligence and reckless conduct.

4. Nothing is more clear in equity than the doctrine that a bargain founded in mutual mistake of the facts constituting the very basis or essence of the contract, or founded upon

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the representations of the seller, who is presumed to know whether the representations which he makes are true or false, material to the bargain, and constituting the essence thereof, although made by innocent mistake, will avoid it. Mistake, as well as fraud, in any representation of a fact material to the contract, furnishes a sufficient ground to set it aside and to declare it a nullity.

The conflict in the decisions on this subject has been mainly produced by the nature of the action and the character of the court trying the cause. The courts of equity would afford relief by reforming or rescinding a contract founded upon a mutual mistake of fact upon a material matter, although the misrepresentation was innocently made by mistake, while the courts of law would afford no remedy, in the absence of a warranty, unless there was either positive or constructive fraud. This will explain the conflict in the two principal cases in this court. The case in 16 Ind. was to recover damages for a false and fraudulent misrepresentation, while the case in 27 Ind. was a proceeding in equity to obtain a rescission of a contract.

There is no longer any reason why the decisions of this court should not be uniform and harmonious on this subject. WORDEN, J., in delivering the unanimous opinion of this court, in *Potter v. Smith*, 36 Ind. 231, says:

"This may not have been the old rule in relation to many suits in equity, but by the code the distinction between actions at law and suits in equity is abolished, and it is provided, that 'there shall be in this State, hereafter, but one form of action for the enforcement and protection of private rights, or the redress of private wrongs, which shall be denominated a civil action.' By the provisions of the code the plaintiff is entitled, on bringing his action, to whatever relief either law or equity would have afforded him, on the case made, before the distinction between them, in practice, was abolished. The two systems are blended together, and either legal or equitable rights are to be enforced in the 'civil action' provided for. So, on the other hand, may the

defendant set up to the action any matter of defence, either legal or equitable.”.

It is quite obvious, from what has been said, that the instruction given was erroneous, and the one asked and refused was correct.

Held

The appellants also complain of the refusal of the court to give the second instruction asked by them, which is in these words, namely:

“If the jury finds from the evidence that Voltz knew that defendants, at the time they purchased, believed that the engine, boiler, and machinery were in good running order, sound and fit for use, and if Voltz knew there were defects in said boiler and engine, which, with ordinary care, could not have been discovered, and of which facts defendants were ignorant, then it was the duty of Voltz to disclose the existence of such defects, and his silence, under such circumstances, would amount to a representation that the boiler and engine were sound, etc., and the defendants, in such case, are entitled to damages.”

PARSONS, in treating of the doctrine of *caveat emptor*, says:

“One important and universal exception is this: The rule never applies to cases of fraud, never proposes to protect a seller against his own fraud, nor to disarm a purchaser from a defence or remedy against a seller’s fraud. It becomes, therefore, important to know what the law means by fraud in this respect, and what it recognizes as such fraud as will prevent the application of the general rule. If the seller knows of a defect in his goods, which the buyer does not know, and if he had known, would not have bought the goods, and the seller is silent, and only silent, his silence is nevertheless a moral fraud, and ought, perhaps, on moral grounds, to avoid the transaction. But this moral fraud has not yet grown into a legal fraud. In cases of this kind there may be circumstances which cause this moral fraud to be legal fraud, and give the buyer his action on the implied warranty, or on the deceit. And if the seller be not silent, but produce the sale by means of false representations, then

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the rule of *caveat emptor* does not apply, and the seller is answerable for his fraud. But the weight of authority requires that this should be active fraud. "The common law does not oblige a seller to disclose all that he knows, which lessens the value of the property he would sell. He may be silent, leaving the purchaser to inquire and examine for himself or to require a warranty. He may be silent, and be safe, but if he be more than silent; if by acts, and certainly if by words, he leads the buyer astray, inducing him to suppose that he buys with warranty, or otherwise preventing his examination or inquiry, this becomes a fraud of which the law will take cognizance. The distinction seems to be—and it is grounded upon the apparent necessity of leaving men to take some care of themselves in their business transactions—the seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in cheating himself." 1 Pars. Con. 578.

The leading English and American cases are collected and reviewed in note (k) on the above page of Prof. Parsons' valuable work, to which reference is made.

We are of the opinion that the law on this subject is correctly stated in the above quotation, and that it is fully sustained by the leading English and American adjudged cases. We, therefore, hold that the court committed no error in refusing to instruct the jury as requested in the second instruction asked.

The judgment is reversed, with costs, and the cause is remanded, with instructions to the court below to grant a new trial, and for further proceedings, in accordance with this opinion.

WORDEN, C. J.—I am of opinion that if a person make a representation, not amounting to a warranty, in good faith, believing it to be true, but which turns out to be false, such representation furnishes no ground of action against him, or defence to an action by him (save an action against him to rescind on the ground of mistake), because in such case there is a total absence of any foundation for the action or defence,

which is fraud. I therefore dissent from so much of the foregoing opinion as asserts a contrary doctrine.

H. W. Harrington, M. K. Rosebrough, and W. D. Wilson, for appellants.

HAYES ET AL. v. WEST ET AL.

WILL.—*Declarations of Testator.—Mental Capacity.*—The declarations of a testator, made at any other time than when engaged in the execution of his will, are not to be considered by a jury, except on the question of mental capacity to make the will.

SAME.—*Subscribing Witnesses.—Evidence.*—If a competent subscribing witness to a will knows that he and another competent witness or other competent witnesses subscribed the instrument in the presence of the testator and at his request, the attestation is sufficiently proved.

37	21
136	8
37	21
142	81
37	21
152	277
37	21
165	361

APPEAL from the Dearborn Common Pleas.

WORDEN, C. J.—This was an action by the appellees against the appellants, to contest the validity of the supposed last will and testament of Walter Hayes, deceased.

The will in question bears date March 9th, 1866, and purports to have been duly signed by the testator, and to have been attested by Henry Brachman, John P. Massard, and Carter Gazley. Before the commencement of this action, the will had been duly proved, and the executors named therein had taken upon themselves the duties of the trust. The objections to the will are stated in the following terms, viz.: “And the plaintiffs further aver and charge that said alleged will is not the valid last will and testament of said Walter Hayes, for the reason that the same was unduly executed, and for the reason that if said Walter Hayes made said will, he was induced to execute said will by the undue and improper influence used and exercised over him by the said Dewitt C. Fitch, Leah Fitch, James C. Hayes, named as contestees, and by one James C. Martin, who is a son-in-law of

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the said James C. Hayes, and who was acting in the interest of his said father-in-law; and, also, further, for the reason that said Walter Hayes was, at the time of the alleged execution of said pretended will, of unsound mind; therefore," etc.

Issue, trial by jury, verdict, and judgment for the plaintiffs below, a motion for a new trial being overruled and exception taken.

The jury returned a general verdict for the plaintiffs, and also the answers appended to the following interrogatories.

First. "Did Walter Hayes sign the instrument purporting to be his last will, or acknowledge his signature thereto, as his last will and testament, in the presence of John P. Massard, Henry Brachman, and Carter Gazley, or any two of them?" Answer. "No."

Second. "Did John P. Massard, Henry Brachman, and Carter Gazley, or any two of them, attest and subscribe the said instrument purporting to be the last will of Walter Hayes, at his request?" Answer. "No."

Third. "Was the said John P. Massard, Henry Brachman, and Carter Gazley, or any two of them, competent witnesses at the time of the alleged execution of said instrument?" Answer. "Yes."

Fourth. "Was said Walter Hayes induced to execute said will by undue and improper influence used and exercised by any person or persons?" Answer. "Yes."

Fifth. "Was Walter Hayes, at the time of the execution of said instrument, purporting to be his last will and testament, of sound mind?" Answer. "Yes."

First. "Did Walter Hayes sign the instrument purporting to be his last will, the validity of which is being contested in this suit?" Answer. "Yes."

Second. "Did Henry Brachman, John P. Massard, and Carter Gazley, or any two of them, who purport to be witnesses to said will, attest and subscribe the same as witnesses, in the presence of said Walter Hayes?" Answer. "No."

Third. "Were the said Henry Brachman, John P. Massard,

and Carter Gazley, or any two of them, competent witnesses to such will?" Answer. "Yes."

Fourth. "Was the said Walter Hayes induced to execute said will by undue and improper influences used and exercised over him by any person or persons, and if so, by whom?" Answer to first question. "Yes." Answer to last. "George W. Pye and D. C. Fitch."

Fifth. "What legacies or devises was said Walter Hayes induced to make by undue and improper influence used and exercised over him by such person or persons?" Answer. "None."

Sixth. "Was the said Walter Hayes, at the time of the execution of such will, of sound mind?" Answer. "Yes."

By these several answers to interrogatories it is established:

First. That the signature of the testator to the supposed will is genuine.

Second. That the testator was of sound mind at the time of the supposed execution of the will.

Third. That the witnesses whose names are appended to the will as such were competent.

Fourth. That no legacy or devise was induced by any undue or improper influence.

The general verdict, then, if it can stand, must rest upon the ground, either that although no particular bequest or devise was induced by undue influence, yet the whole will was procured to be made by such influence; or that the will was not formally executed, including the attestation, in the manner prescribed by law.

The evidence in the cause is before us, in which we find nothing that seems to us to justify setting aside the entire will as having been procured by undue influence. In respect to this point we also think the court below erred in one of the charges given to the jury, and in refusing one of the charges asked by the defendants. Evidence was given of several statements made by the testator to third persons, in which he expressed himself as being entirely satisfied with

the laws of descent and distribution, and indicated an intention not to make any will. These statements were not made, of course, at the time of the execution of the will, and were, therefore, no part of the *res gestæ*.

The defendants asked the court to charge as follows:

"The declarations or statements of a testator made at any other time than at the time when he is engaged in the execution of the instrument claimed to be his will, cannot be considered by the jury in determining the question of the execution of the will, but such declarations or statements were permitted to go to the jury for the purpose of enabling them to determine his mental capacity, and not for the purpose of proving or disproving its execution."

This charge was refused, but the court gave the following: "The declaration of Walter Hayes, made before or after the execution of the will, will not be considered by you in connection with the execution of the will, for it does not tend to prove or disprove the execution thereof. These declarations are only evidence tending to prove the propositions of insanity and undue influence in connection with other facts and circumstances bearing upon these propositions."

It will be seen that by the charge asked and refused the defendants sought to limit the evidence of the declarations of the testator to the consideration of the question of his mental capacity; while the charge given left the evidence to be considered by the jury in determining "the propositions of insanity and undue influence." Herein lies the error. We are of opinion that the mere declarations of a testator, not made contemporaneously with the execution of a will, are not admissible for the purpose of showing that the will was procured by undue influence. There are cases that hold the other way, but, as we think, both principle and the weight of authority exclude the mere declarations of a testator for such purpose. We quote the following passage from 1 Redf. Wills, 546:

"And although some of the American cases incline to

hold that the declarations of the testator are admissible to prove the fact of fraud, or undue influence having been exercised in the procurement of the will, we think the rule of law is clearly against the admission of any such testimony for that purpose. The point has been so ruled in a considerable number of well-considered cases, and the principles of evidence are so clearly in favor of the rejection of the testator's naked declarations upon that point, that we cannot believe any such rule will ever be permanently acted upon." See, further, the text and cases cited on pp. 545-6-7.

The statements imputed to the testator were, in substance, that he was satisfied with the disposition which the law would make of his property after his decease, and, putting it in as strong terms as the testimony will warrant, that he should not make any will.

The making of a will, after the making of such statements, certainly indicates a change of mind on the part of the testator. But does such change of mind carry with it any inference whatever that the change has been effected by undue influence? We think not. One of the characteristics of the human mind is changeability. Without change, little progress would be made in civilization, and little elevation attained in the scale of human life. Men's minds and purposes change from observation, reflection, investigation, and a great variety of assignable and unassignable causes; and this, too, without the controlling influence of any master mind. A man at one time concludes that he will make no will, but let his estate descend according to the law in the absence of a will; he subsequently changes his mind and makes a will; can it be said that such change of mind, either alone or in connection with other evidence, is competent to prove that the change was effected, or the execution of the will procured, by undue influence? If it is competent to be considered for that purpose, it is because the court can say, as a matter of law, that it has a tendency to establish the fact of undue influence. This the court cannot say. We

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are of opinion that the charge asked should have been given, and the charge given withheld.

The only remaining question in the cause is whether the evidence established the formal execution of the will, including the attestation thereof, as required by law.

The three attesting witnesses were examined, each of whom testified to the acknowledgment by the testator of the execution of the will by him, and that they signed it as witnesses at his request, and in his presence. They abundantly prove the due formal execution of the will. But it is insisted by counsel for the appellees, that two of the subscribing witnesses were successfully impeached, and that the jury were, therefore, justified in disregarding their evidence. We express no opinion as to the effect of the evidence claimed to have been impeaching. The situation of the case renders it unnecessary that we should do so. One of the attesting witnesses is not claimed to have been in any manner impeached, and his testimony alone, in our opinion, establishes the due execution of the will, and he is strongly corroborated by another witness, who, though he was not present when the will was executed, was present with the draftsman and the testator a short time before the execution, when the provisions of the will were discussed, and he was asked to sign the will as a witness, but going out, he did not return in time.

But it is insisted that the testimony of one witness is not sufficient to prove the execution of the will, inasmuch as the statute requires two or more to attest it. The statute requires a will to be attested and subscribed in the presence of the testator by two or more competent witnesses, but it does not require that the witnesses shall subscribe in the presence of each other. 2 G. & H. 555, sec. 18.

If one witness, however, knows that he and the other witness or witnesses subscribed the will, as such, in the presence of the testator, and at his request, there seems to us to be no legal necessity for calling any more. One witness is suf-

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ficient to establish a will when offered for probate. 2 G. & H. 557, sec. 27.

This leaves no ground on which the general verdict can stand. However reluctant we may be to disturb the verdict of a jury merely on the evidence, cases sometimes occur which call upon the courts to discharge that duty. This is one of the cases. The court below erred in overruling the motion for a new trial.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

J. E. McDonald, J. M. Butler, E. M. McDonald, J. Schwartz, N. S. Givan, and P. L. Spooner, for appellants.

D. S. Major, J. D. Haynes, F. Adkinson, and W. S. Holman, for appellees.

PERKINS ET AL. v. WRIGHT.

CARRIER.—*Baggage*.—*Porter*.—The price paid by a passenger on a steamboat usually includes the charge for the transportation of his baggage; and as the carrier must provide some one to care for it, that person is the agent of the carrier, although he be not one of the crew or paid by the carrier, but a porter, who receives his compensation from the passenger.

PARTIES.—*Minor*.—A minor may, by his next friend, maintain an action against a carrier for the value of clothing or other property given to him by his parents or others, and lost by the defendant.

APPEAL from the Vanderburg Circuit Court.

DOWNEY, J.—The appellee sued the appellants, the owners of the steamboat Mollie Norton, as common carriers, for the value of a carpet sack and contents, which, it is alleged, were shipped at Henderson, Kentucky, to the plaintiff at Evansville, in this State, and never delivered. The complaint commences, "Prince A. Wright, an infant, who sues by Edward H. E. Wright, as next friend, complains," etc. The second paragraph commences thus: "The said plaintiff further complains of the said defendant," etc.

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The first paragraph states that the defendants promised in consideration that the plaintiff delivered to the said defendants the goods; and the second paragraph alleges that they promised in consideration of a reasonable reward, to be paid by the plaintiff. The defendants demurred to the first and second paragraphs of the complaint, for the reason that neither of them stated facts sufficient to constitute a cause of action. This demurrer was overruled, and the defendants excepted. This is the first error assigned. We need not stop to consider whether the first paragraph is defective, as contended by counsel for the appellants, or not; for conceding that it is, and that the second is good, as is admitted, we must hold that the demurrer was a demurrer to both, and was properly overruled if either paragraph was good. This is not like the cases where the party demurs to each paragraph in a complaint, answer, or reply, and where it has been held that the demurrer may be taken distributively, and sustained to some and overruled as to others, as in *Fankboner v. Fankboner*, 20 Ind. 62; *Parker v. Thomas*, 19 Ind. 213.

The introductory part of the complaint was sufficient to show that the plaintiff sued by his next friend; and the commencement of the second paragraph must be held, by reference to the first, to be sufficient also in this respect.

The remaining question in the case is as to the sufficiency of the evidence to sustain the finding of the court, which arises out of the motion for a new trial in the court below, and the refusal of the court to grant the same, which refusal is assigned for error.

It was admitted at the trial of the cause that the defendants were the owners of the steamboat Mollie Norton, and that they were common carriers, as alleged in the complaint.

It was also admitted that by depositions taken and lost it sufficiently appeared that a carpet sack belonging to the plaintiff had been sent from Madisonville, Kentucky, to the wharfboat at Henderson, Kentucky, to be sent from there by boat to plaintiff, at Evansville, Indiana, about the time the goods mentioned in the complaint are alleged to have been lost.

The plaintiff, Prince A. Wright, testified as follows: "I was the owner of the carpet sack, sent from Madisonville, Kentucky, as admitted at the beginning of this trial; it was the same as this suit was brought for; it was a carpet sack, containing clothing, papers, and books, as specified in the bill of particulars with the complaint; the articles were worth the money charged for them in the bill of particulars; I was the owner; my father paid for them; I had no money of my own; had never been in business for myself; was a minor and lived with my parents; my father paid the price for said articles, as shown by the bill of particulars; they were all as good as new."

Cross examined. "I had worn the shirts two or three times; there was a new suit, consisting of the doeskin pants, seventeen dollars, blue frock coat, thirty-five dollars, and the satin vest, twelve dollars and fifty cents, which had never been worn; these were in a box, and not in the carpet sack; the balance were in the carpet sack; the sack coat had been worn considerable, also the hat; I had gone over to Madisonville to get into business, but failed to get the place, and came back home, and ordered my clothing sent back to Evansville to me; the clothing has been lost, and I have never seen it since; I left it at Madisonville, Kentucky; I am now a few weeks over twenty-one years old."

E. H. E. Wright testified as follows: "Plaintiff is my son; I live in Evansville, Indiana; I bought and paid for the articles mentioned in the complaint for my son, and paid the price shown in the bill of particulars; I bought them for my son and gave them to him; he was going to Madisonville, Kentucky, to get into business; he went over, but was disappointed and came back home; the clothing belonged to the plaintiff; the defendant, Perkins, admitted that the carpet bag had been on his boat; I went down to see him on the Mollie Norton, and he said he believed the porter had stolen the clothes; he said the men at the wharfboat at Henderson had told him that they gave it to the porter of the Nor-

ton; the goods have been lost and never delivered to the plaintiff."

Cross examined. "I paid for the goods; I always pay for my children's clothing who are under age; the plaintiff was a minor, had been living at home, had never been in business for himself; I gave him his clothing just as I did to my other children, except that he had better clothes, because I had sent him from home to college. When I first went to the Norton to see about the goods, Perkins declared that he knew nothing about them, and they were not on the boat, and he had no knowledge of them; told me to wait and he would make inquiry about them; I saw him a few days after, and he admitted that my son's carpet sack had been on the boat, but said he could not find it; believed his porter had stolen it; he sent for my son to come down and see whether the pants which his porter was wearing were his pants; he never admitted that it had been received or properly delivered on his boat, but admitted that it had been on his boat, and he believed his porter had stolen it."

Nathan Groves, a witness for defendants, testified: "I am a clothing merchant in Evansville; clothing which has been worn two or three weeks would not be worth more than twenty-five to fifty per cent. of cost price; no satin vest is worth twelve dollars and fifty cents; from six to eight dollars is a good price for a good satin vest."

Cross examined. "Clothing worn two or three weeks would be worth more than twenty-five to fifty per cent. of cost price to the owner, but would not bring more than that if put up for sale. Shirts worn but twice would be worth about as much to the owner as when new."

Charles G. Perkins. "I am one of the defendants to this action; I was the master of the Mollie Norton at the time referred to; do not think that I ever admitted to Mr. Wright that the goods were on my boat; I have no recollection whatever of making any such admission; I am certain that I never admitted that they were delivered on my boat, or received by any officer having authority to receive them; there were

no facts upon which I could make such an admission; when Mr. Wright first came to the boat, I told him I knew nothing about them, and never had heard of them; I looked at the freight book in which all freight is entered, and could find nothing of it; I told Mr. Wright to come down again, and in the meantime I would make inquiry about it; I looked through the boat, looked into every state room, and made diligent inquiry, and could never find or learn that the goods had been on my boat; I may have told Mr. Wright, that I had suspicions that my porter had stolen them, and think I told him something of that sort, and sent for his son to come down and see whether the pants my porter had on were his pants, but am certain that I never made any other admission than might be implied from that. Porters have no authority whatever to receive freight; that is the business of the master or clerks; porters take charge of passengers' baggage, black boots for passengers, etc., but they get their pay from passengers, whatever they see fit to pay them; they are not hired by the boat and do not belong to the boat's crew; they get their meals for helping to wait on the table, tending to the fires in the cabin and for sweeping out the forepart of the cabin. Porters, also, sometimes carry small packages for persons not on the boat, but in such cases they have no authority to receive them for the boat. The boat receives no compensation in such cases; the officers take no notice of it, and are not supposed to know anything at all about it. Any compensation for such services is paid by the owners of the package, and the boat has nothing to do with it. I have always told my porters not to carry any packages, and if anything except baggage of a passenger is brought on my boat, it should go as freight and a bill of lading should be given. The porters have the entire charge of all baggage on board, and the officers pay no attention to baggage."

Volney Screnson. "I was clerk on steamboats in the trade here about Evansville for about eight or ten years; I am now in the office of the surveyor of customs for the port of Evansville, or deputy surveyor of customs; I know that porters of

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steamboats have no authority whatever to receive freight; they look after the fires in the cabin, black passengers' boots, and take care of passengers' baggage; they do not belong to the crew of the boat. In my present employment I see all returns of steamboat crews, made to the surveyor of customs, which have to be made for the purpose of collecting dues, for marine hospital. In these returns porters of boats are never included, and porters are not entitled to be treated or cured in the United States Hospital, as all members of a boat's crew are. Porters sometimes carry small packages for persons not passengers, but in such cases the steamboat receives no compensation for it, the officers take no notice of it, and in most cases know nothing at all about it."

Cross examined. "When porters carry small packages they receive some compensation, but it is from the owner of the package, and not from the owner of the boat, and the boat has nothing to do with it. The porters get their pay from the owners of packages and baggage."

Allen J. Duncan. "I have been steamboating about Evansville for a good many years; am now master of the steamer Sam Orr; I know the position and duties of porters on a boat; they take charge of passengers' baggage, black boots, attend to fires, etc.; they receive no pay from the boats, nor do they belong to the boat's crew; they have no authority to receive freight for the boat; that is the business of the master and clerks. Sometimes porters carry small parcels from place to place for persons not passengers, but the boat has nothing to do with it, and receives no compensation in such cases; it is generally done without the officers of the boat knowing anything about it; they have no authority to receive anything for the boat unless it is passengers' baggage; they have charge of that.

Cross examined. "When porters carry small parcels from place to place for persons not on the boat, they get their pay from the owners of the parcels. The porters have charge of all baggage."

A. J. Hutcheson, master of the steamer D. Newcomb, and

Lee Howard, master of the steamer Florence Lee, being present as witnesses, it was admitted by plaintiff that they would testify concerning the duties and relations of porters substantially the same as the foregoing witnesses had done. And this was all the evidence given in the cause.

Several objections are urged against the sufficiency of this evidence to sustain the finding of the court. It is insisted, in the first place, that, conceding that the court might, from the evidence, have found that the goods went into the hands of the porter on the steamboat, still it does not sufficiently appear that he was authorized to receive the same, and if he did receive them, that this did not bind the carriers or make them liable for their delivery to the owner.

It is very clear that to bind the carrier for the safe carriage and delivery of the goods, they must be delivered to him or to his authorized agent; they must come to his possession. *Chitty Carriers*, 26; *Ford v. Mitchell*, 21 Ind. 54.

It is not usual for a passenger to pay for the transportation of his baggage separate from what is paid by him for his own transportation. What he pays for his own carriage includes also pay for the carriage of his baggage. In this instance, however, the owner of the baggage was not on the boat, and therefore a compensation for the carriage of the baggage would be impliedly due to the carrier for the transportation thereof, and this is true whether the goods be denominated baggage or freight. In either case there must have been a delivery to the carriers, or to their agent or servant, to make them responsible. The appellants seem to concede, and we think must concede, that the porter was their agent and servant in the receipt of the baggage of passengers on the boat, and in the care and delivery thereof. As they are bound to transport the baggage of passengers, as well as the passengers, they must provide some one to take charge of it, and this person must be held to be their agent.

As we are not quite agreed whether or not, under the circumstances shown, the porter was the agent of the carriers

to receive the goods in question, we leave that point undecided.

Second. It is contended that the father, and not the son, should have brought the action. The reason assigned for this position is, that the plaintiff was under age, and that the goods were purchased by the father and given to the son. There is nothing in this. A minor can own property which has been given to him, whether by his father or by some other person.

Third. The next point made is, that the damages are excessive. The value of the sack and contents, as set out in the bill of particulars, is one hundred and thirty-five dollars and seventy-five cents. The judgment was for one hundred and nineteen dollars and thirteen cents. We think the court allowed this amount as the value of all the articles in the bill of particulars. But the plaintiff testified that the doeskin pants, seventeen dollars; blue frock coat, thirty-five dollars; satin vest, twelve dollars and fifty cents; making sixty-four dollars and fifty cents, were in a box, and not in a carpet sack. There is no charge in the complaint of the shipment or loss of any goods in a box, nor does the evidence show that any box of goods was sent from Madisonville or shipped on board the boat at Henderson.

Leaving out the value of the clothing shown to have been in the box, the judgment below is too large by whatever the court found to be the value of those articles.

The judgment is reversed, and the cause remanded.

S. R. Hornbrook, for appellants.

J. M. Shackelford and ——— *Williamson*, for appellee.

DE ARMOND v. ARMSTRONG.

LIBEL.—*Pleading.*—*Introductory Matter.*—*Colloquium.*—*Innuendo.*—Where, in an action for libel, words alleged to have been published are not *per se* actionable, there should be a prefatory allegation of such extrinsic matter, or of such special meaning of the words as renders them libellous, and the *colloquium* should connect therewith the using or publishing of the words complained of, the *innuendo* giving to the words the interpretation borne by them in relation to the extrinsic fact or special meaning.

SAME.—*Justification.*—Although the truth of the matter charged to be libellous may be shown in defence, yet an answer, in order to make it a good justification, must specifically point out the acts of which the plaintiff was guilty, that the court may see whether the defendant was justified in what he published.

SAME.—*Evidence.*—Where the plaintiff, in such action, has alleged the meaning of certain words, and to whom they referred, he may prove by witnesses what they understood by the words and of whom they were published.

APPEAL from the Decatur Circuit Court.

PERTIT, J.—This was a suit by the appellee against the appellant for libel. The complaint was in two paragraphs. There was a motion to strike out the first paragraph, because it was the same as the second, overruled, and exception taken; a motion to strike out parts of this paragraph overruled and exception; and a demurrer for want of sufficient facts to it as a whole, and to its several parts, was filed, overruled, and exception. But we need not notice these rulings, or the errors assigned thereon, because this paragraph was subsequently withdrawn, and the case, so far as it was concerned, dismissed. This was done after the evidence had been given, and the arguments of counsel had been made, but before the instructions of the court had been given to the jury, and was objected and excepted to by the defendant, and is assigned for an error. But we hold that it was no error. 2 G. & H. 118, sec. 99, and the authorities cited in the notes fully warrant this action of the plaintiff and the court.

The case of *Ostrander v. Clark*, 8 Ind. 211, is cited to sustain the view of the appellant. That case decides that when an amendment is made, after the jury is sworn, which makes

37	35
139	467
37	35
146	685

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an issue the jury were not sworn to try, it is error to proceed without re-swearing the jury. In this case the jury was sworn to try the issues. The withdrawal of the first paragraph of the complaint did not make a new issue, but simply withdrew one from the consideration of the jury. No new issue was formed, and the withdrawal of the paragraph could do no injury to the defendant.

The second paragraph of the complaint is as follows: Said plaintiff complains of said defendant, and says that the plaintiff is, and for many years past has been, a resident and citizen of Sand Creek township, of said county; that John Cheek was township trustee of said township from April, 1864, to April, 1867; that during the war for the suppression of the late rebellion, the President of the United States ordered a draft for men to serve in the armies of the United States, and that it became necessary for said township to furnish a quota of men, either by draft, volunteering, or hiring substitutes, or by otherwise obtaining credit to relieve said township from said draft; that for the purpose of collecting and disbursing money and means to clear said township from said draft, and for the relief of the drafted men of said township, the citizens of said township held a public meeting, on or about the 18th day of October, 1864, and elected and appointed the plaintiff, said John Cheek, and six others, citizens of said township, as a committee, and in behalf of the citizens of said township, to raise and expend money, and devise means for the purpose aforesaid; that thereupon said committee entered upon, and have ever since been engaged in, the discharge of their duties as such committee; that in the year 1864, said trustee, with the advice and consent of the board of county commissioners of said county, levied a tax on the property of said township, popularly known as the military tax, for the purpose, among others, of clearing said township from said draft, and reimbursing said committee the money borrowed by them for that purpose, also for the purpose of the relief of the drafted men of said township; that said tax was in part collected;

that the plaintiff is, and for many years has been, a member of the Democratic party, and that on or about the 8th day of January, 1868, there was a state Democratic convention, held at the city of Indianapolis, which was attended by the plaintiff as a delegate from said county; that the words "red eye" and "critter" have acquired, in the neighborhood of the plaintiff, and in said county, a provincial meaning, and are understood to mean whisky, or other spirituous and intoxicating liquors; that at the March term, 1868, of the board of county commissioners of said county, one Michael Taney applied for license to retail intoxicating liquor in a less quantity than a quart at a time, in the town of Westport, in said township; that the plaintiff and others obtained and filed remonstrances before said board against the granting of said license; that when said cause came on for trial, at said court, Wren Grayson, one of the members of said board, was absent, and that in his absence said Taney failed to obtain said license; that the defendant, on or about the 28th of March, 1868, at said county, composed and caused to be published in a newspaper of general circulation, published in said county, called the Greensburg Herald, a certain false, scandalous, malicious, and defamatory libel of and concerning the plaintiff's character for honesty and sobriety, and of and concerning the honesty and fidelity of said committee in the discharge of their duties as aforesaid, in a part of which was and is contained the following: (1) "Chief among them is our delegate" (plaintiff meaning) "to the state convention" (meaning state Democratic convention aforesaid), "who helped to get through the celebrated whisky plank in the state platform, a good friend of 'red eye'" (meaning whisky or spirituous and intoxicating liquors) "then, but 'hell-bent' (excuse his language) against the 'critter'" (meaning whisky or other spirituous and intoxicating liquors) "now, probably caused by an overdose while at Indianapolis." (2)

(A) That the defendant meant and intended by the above words to charge that the plaintiff, while at the city of Indian-

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apolis in attendance at the convention, as aforesaid, was guilty of the intemperate and inordinate use of whisky or other intoxicating liquors, and was so understood by the readers of said newspaper. (B)

And in another part of said article there was and is other false, scandalous, malicious, defamatory, and libellous matter, to wit:

(3) "They" (meaning certain parties of whom the plaintiff was one) "were on hand at the Republican convention, using their influence to induce the Republicans to nominate a man that they" (meaning the plaintiff and others) "could depend upon if elected, to cover up their" (meaning the plaintiff and others) "former rascality in township business. They" (meaning the plaintiff and others) "have a bad record, one that will not bear bringing to light, and they" (meaning plaintiff and others) "but use the whisky 'bugbear' for the purpose of directing attention from it." (4)

(C) And the plaintiff avers that the above words of said libel were composed and published by the defendant with the intent then and there to charge certain members of said committee and the plaintiff, as one of said members, with having fraudulently swindled and defrauded said township, or the citizens thereof, of money raised for the purpose of clearing said township from said draft, and for the relief of drafted men of said township. (D)

And in another part of said article occurs the following words:

(5) "During draft times, these 'round heads'" (meaning members of said committee, of whom plaintiff was one, and others) "did everything in their power to prevent the township from being taxed for the relief of drafted men, and partly succeeded on the last draft. However, when the tax was levied, they" (meaning the plaintiff as one of the parties and others) "had control of the money and committed and trusted it pretty much up; at any rate the twenty-six drafted men who got a township order, each for one hundred dol-

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lars (although that amount was levied and collected of the people), never received one cent of the money." (6) .

(E) That said defendant thereby meant and intended, and was understood by the readers of said paper to charge said committee and said trustee with the crime of appropriating to their own use, embezzling, and squandering moneys so said to have been committed to their control, and of corruption in the discharge of the duties imposed upon them by their fellow-citizens of said township. (F)

And in another part of said article there was and is contained the following libellous words:

(7) "They" (meaning plaintiff and other members of said committee) "have spent some weeks in company with prominent Black Republicans of the township to prevent Democrats from pursuing a business authorized by the law of the State and the platform of their party" (meaning the retailing of intoxicating liquors). "They" (meaning certain parties of whom the plaintiff was one) "succeeded, by the absence of one of the commissioners" (meaning Wren Grayson, one of the county commissioners of said county), "supposed to have been occasioned by the use of their dollars" (8) (meaning money belonging to or controlled by parties of whom the plaintiff was one). (G) That said defendant meant and intended by said words to charge that certain parties, of whom the plaintiff was one, had been guilty of keeping Wren Grayson, one of the board of commissioners of Decatur county, from attending at a meeting of said board, when it was his duty to have been present, by bribing him with money to prevent him from discharging his duties as such officer. (H)

And in another part of said article there was and is the following libellous matter:

(9) "They" (meaning certain parties, of whom the plaintiff was one) "succeeded last spring" (meaning the spring election, 1867) "in forcing one of their clan upon the people for trustee" (meaning township trustee of said township), "and by his false promises to investigate these frauds of Cheek and others"

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(meaning the plaintiff as one of the parties), "got elected by a reduced majority." (10)

(I) That by the above words the defendant meant and intended, and was understood to mean and intend, to charge the plaintiff and other parties, members of said committee, with having corruptly and fraudulently defrauded the said township, or the people thereof, out of money raised by taxation and otherwise, while in the discharge of their duties as such committee, and with having connived at and consented to the making of false promises by a candidate for township trustee, of said township, for the fraudulent purpose of concealing their said crime from the public. (J)

That said article in each and every allegation is wholly false and untrue, and by means of its publication the plaintiff has been and is damaged and prejudiced in credit and reputation in the sum of ten thousand dollars, for which sum he demands judgment, and for all other proper relief.

There was a motion made to compel the plaintiff to separate his cause of action into paragraphs, which was properly overruled. All the matter is rightly in one paragraph. The defendant moved the court to strike out of complaint above set out all the parts from figure 1 to 2; from 3 to 4; from 5 to 6; from 7 to 8; from 9 to 10, and from letter A to B; from C to D; from E to F; from G to H; from I to J. This motion was overruled, and there was no error in this ruling. A demurrer for want of sufficient facts was filed to the complaint, as it appears above, and was properly overruled. The complaint is good in all respects.

It is argued that the innuendoes should have been stricken out, as they make words actionable which are not so in themselves, and enlarge and change the ordinary meaning of the words in the libel, which is not the office of an innuendo. This is true, unless, as in this case, there is a colloquium and prefatory allegation of some extrinsic matter, or an explanation of the particular meaning of words and phrases. *Ward v. Colyhan*, 30 Ind. 395; *Hays v. Mitchell*, 7 Blackf. 117.

The defendant then filed his answer, in five paragraphs, as follows:

First. General denial.

Second. That he admits that said plaintiff was a member of the committee appointed to relieve Sand Creek township of the drafts of its citizens into the military service of the United States, and acted as such committeeman during the existence of such committee. He admits that a tax was levied in the years 1864 and 1865 to raise money to fill the quota of said township under said call, but he denies that the funds raised by said taxes were at the disposal of said committee; that he did write the article which in part referred to the plaintiff, and from which the passages set forth in the complaint are extracts. He denies that the innuendoes written in the complaint correctly state his intention and meaning, but that said article entire is as follows, viz.:

“FROM WESTPORT—A PLAIN TALKING LETTER, IN WHICH NAUGHTY QUESTIONS ARE ASKED, AND AN ANSWER EARNESTLY DESIRED — REPUBLICANS TAMPERING WITH OFFICIALS — BIRDS OF A FEATHER FLOCK TOGETHER—WHAT WENT WITH THE MONEY?

“*Editor Herald*.:—I wish a small amount of space in your paper, for the purpose of informing your readers of the condition of the Democratic party in this township. We have had heretofore from eighty to one hundred and fifty majority, which could easily be increased, were it not for some meddlesome individuals, who claim to be *par excellence* Democrats, equal in strength to the ‘Brick Pomeroy make.’ They are, however, in faith like a certain clan of Democrats were in 1854. They wish to dictate to other people what business they shall follow, and what they shall eat and drink while pursuing the same. They are anti-whisky, anti-license, in short, Maine-law men, and from their actions we infer they have secret meetings, and if there was any dog-fennel, would be found wallowing in it equal to the dark lantern K. N.’s of that year. Chief among them is our delegate to the

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state convention, who helped to get through the celebrated 'whisky plank' in the state platform—a good friend of 'red eye,' but 'hell bent' (excuse his language) against the 'critter' now, probably caused by an overdose while at Indianapolis. Since his trip to the convention, there has been an application or two for licenses to sell liquor in Westport, and although by good Democrats and respectable citizens, this would-be leading Democrat (but, in fact, Puritan 'round head'), in company with a few others of the same stripe, and the leaders of the 'Manhood Mongrel' party have set up a furious howl, equal in fierceness to that of the Methodists or the K. N.'s of former years. They have spent some weeks canvassing among the people, getting signers to their remonstrance, and electioneering in support of their Maine-law notions.

"They have tried hard to defeat the calling of a Democratic convention, but, failing in this, are determined to drag their whisky notions in the political contest for the nominations.

"Already they have been canvassing and denouncing certain Democrats who have dared to announce themselves candidates without asking them, as 'whisky Democrats,' and as running on a whisky platform, and declaring, in advance of the nominations by the convention, that they cannot be elected if nominated.

"They have been for some time buttonholing the leaders of the opposition, and begging them to support their temperance candidate for justice, promising in return to support the balance of the Radical ticket. There is no doubt, from present indications, but that they have made up their minds, in case they fail to get one of their clan nominated, to bolt the nominations and support the Radical candidates. They were on hands at the Republican convention, using their influence to induce the Republicans to nominate a man that they could depend upon, if elected, to cover up their former rascality in township business. They have a bad record, one that will not bear bringing to light, and they

but use the 'whisky bugbear' for the purpose of diverting attention from it. During draft times, these 'round heads' did everything in their power to prevent the township from being taxed for the relief of drafted men, and partly succeeded on the last draft. However, when the tax was levied, they had control of the money, and committed and trusted it pretty much up; at any rate the twenty-six drafted men, who got a township order each for one hundred dollars (although that amount was levied and collected of the people), never received one cent of the money. Will Mr. Cheek tell the tax payers of this township what became of that money? Will he also tell them why certain Republicans like Cones, Elliott, and Johnson were let off paying their tax, and other poor men, good Democrats, had their property sold for this same tax? Mr. Cheek says there is a debt of nine hundred and fifty dollars yet owed for the first draft. Will he inform the people why he did not have the Republicans spoken of and others to pay their taxes as well as Democrats?

"If he had done this, the debt would not now be unpaid. But Mr. Cheek will say it was the fault of the county treasurer. This is not true, for the treasurer was ordered by these would-be kings of Sand Creek township not to push Messrs. Cones, Elliott, and Johnson. What their reasons were, we can only guess. Will Mr. Cheek also inform the people by what authority he acted in this tax collecting business, and whether or not he did it by authority of his being trustee? If so, will he tell the people why he charged his full pay as trustee, and some four hundred dollars besides, for handling and squandering this military fund? Mr. Cheek claims to be a good Democrat, of course, and gets very angry when any Democrat speaks of this matter, but the people have a right to judge a man by the company he keeps. He and Armstrong, Owens, and others may be seen eight or ten days of each week caucusing around Westport with such specimens of the 'manhood party' as Bill McCullough, Giddings, Boicourt, Grayson, and others of that ilk. They have

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spent some weeks in company with prominent Black Republicans of this township, to prevent Democrats from pursuing a business authorized by law of the State and the platform of their party. They succeeded by the absence of one of the commissioners (supposed to have been occasioned by the use of their dollars). Such men have no business in the Democratic party. And for one, I am in favor of cleaning them out, like the Maine-law friends were in 1854. We will be better off without them, and the convention to-day ought to pass resolutions of expulsion against them. We have a hard contest before us this fall, and it will not do for us to undertake to carry these 'dead weights' any longer. They succeeded last spring in forcing one of their clan upon the people for trustee, and by his false promises to investigate these frauds of Cheek and others, got elected by a reduced majority.

"They also scratched the ticket, and defeated one of our best men for justice of the peace; afterward, being ashamed of it, turned round and charged it upon others, thus adding insult to injury. A nice set of 'leaders.' How long the party is to be cursed with them is the question here in Sand Creek.

[Signed]

FAIR PLAY."

And said defendant says he wrote said article because it is true, and so much of it as asks for information was legitimate and pertinent to matters about which he, as a citizen of said township, had a right to inquire. He says that said communication was not written or published through malice, and he asks to be discharged with his costs.

Paragraph 3. The defendant, for answer to the plaintiff's complaint, says that he admits the plaintiff was a member of the committee appointed to relieve Sand Creek township from the drafts then pending over said township, and continued such during its existence. He admits that a special military tax was levied in the years 1864 and 1865, to relieve said township of said drafts; but the defendant denies that said plaintiff, as one of said committee, had any power to

receive or disburse said money arising from such taxes in the manner hereinafter explained. The defendant admits that he wrote the article which in part referred to the plaintiff, and from which the passages set forth in the complaint are extracts; that he wrote the article as a citizen of Sand Creek township, upon the suggestion of a number of citizens of said township; that said extracts set forth in the complaint are not the whole of said article, and the circumstances which called it forth are not correctly stated in the complaint; that so far as the plaintiff is concerned, it is a true and lawful publication, such as defendant, as a citizen of said township, interested in its affairs, might lawfully make without incurring any responsibility to the plaintiff therefor; that the statements, so far as they referred to the plaintiff, were honestly made by the defendant, as a citizen of said township, anxious that a full and fair investigation should be had of all officials who had managed, and were to manage and control, its public money, particularly the fund known as the draft fund, in which the whole people of the township were interested; that the defendant had probable cause to believe, at the time of said publication, and did believe, that said statements, so far as they referred to the plaintiff, were true, and he further says that if any part of said article set forth in the complaint, and relating to the plaintiff, shall turn out to be otherwise than strictly true, then, so far as it may prove untrue, if in any particular, it was an honest mistake, made without ill-will or improper motives toward the plaintiff, into which defendant was led by the conduct and actions of the plaintiff himself, for which the plaintiff ought not to complain, and can hold the defendant to no legal accountability; that in the year 1864, a special tax for military purposes was levied upon the taxable property of the citizens of said township, by which \$8,009.10 of taxes were carried upon the duplicate, which was placed in the hands of the county treasurer for collection; and that in the year 1865, a further special tax was levied upon the same property, by which \$9,277.50

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were carried upon the tax duplicate, in the hands of the county treasurer, for collection, which levies were afterward legalized by act of the legislature of Indiana, and by both levies the sum \$17,286.60 were levied of the citizens of said township, but by some process, never publicly explained, favoritism was indulged in by those claiming the right to collect and manage the collection of said taxes, by which the following taxes were dropped from the tax duplicate of 1864, and never collected, viz :

Taxes of Robert Cones, \$102.15; taxes of Ludlow Johnson, in name of Jerusha De Armond, \$62.35; taxes of Sanford and Nancy Elliott, \$54.65; in all, \$219.35, so far as known to said defendapt; that by the direction of said committee the taxes of a number of tax-payers were paid by notes not authorized by law; and said defendant says that the plaintiff counselled and connived at these illegal transactions, and claimed the right to do so as a member of said committee; that the sum of \$6,787.80, at least, was paid to the members of said committee by persons who were drafted, making an aggregate military fund of \$24,074.40, when only \$17,000 was the net amount paid for the recruits by which said township was relieved from said draft; that twenty-six orders of \$100 each, were issued to the persons who were drafted, by the trustee of said township, all of which are unpaid and still outstanding, and held by citizens of said township, to pay which orders said levy was in part made.

That on the 20th day of February, 1867, John Cheek, who was trustee of said township from April, 1864, to April, 1867, and a member of said committee also, made the only report of his official acts as such trustee that can be found, or is now on the files at the auditor's office of said county, by which it appears that said trustee claimed credit for \$200 loaned the son of the plaintiff on the 21st day of July, 1866; for \$100 loaned Amos Miller on the 29th day of July, 1866; for \$229 loaned Lewis D. Owen, and \$398.94 loaned William M. McCullough, another member of said committee, on the 26th day of October, 1866; and a further credit of \$400 for

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orders, when none of said \$2,600 of orders had, in fact, been redeemed; and a further credit of \$576.35 for "amount received of treasury" in notes, accounts, etc.—making the sum of \$1,904.29 of credits which do not appear as legitimate items of credit; that by said report \$904.90 were paid out for officers' fees, and said trustee subsequently claimed and retained between \$300 and \$400 for his fees for collecting and paying out said fund; that said report claimed that \$3,159.38 of said taxes were delinquent, when in fact no such sum was delinquent, a copy of which report is herewith filed and made a part hereof, viz.:

"Report of trustee of Sand Creek township, Decatur county, Indiana, to the county commissioners of said county, of the military fund belonging to said township, and the valuation of said township, and assessment for the years 1864 and 1865:

Valuation for 1864.....	\$533,882.00
Assessment on each \$100, 1.50.....	8,008.23
For 1865.....	579,844.00
Assessment on each \$100, \$1.60.....	9,277.50
Total assessment for 1864 and 1865.....	17,285.73
Amount received.....	14,126.35
Delinquents.....	3,159.38

AMOUNT RECEIVED AT DIFFERENT TIMES.

April 24, 1865, received from treasury.....	\$4,982.57
October 19, 1865, received from treasury.....	1,272.55
May 4, 1866, received from treasury.....	5,738.94
July 21, 1866, received from treasury.....	300.00
August 6, 1866, received from treasury.....	100.00
August 8, 1866, received from treasury.....	100.00
October 12, 1866, received from treasury.....	29.00
October 12, 1866, received from treasury.....	398.94
October 12, 1866, received in notes and accounts from treasurer.....	576.35
October 12, 1866, treasurer's fees	20.00

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January 14, 1867, received from treasury.....	\$108.00
February 16, 1868, received from treasury.....	500.00
Total received.....	\$14,126.35
Amount paid out.....	14,064.57
Amount on hands.....	\$61.78

AMOUNT PAID OUT AT DIFFERENT TIMES.

January 14, 1865, Greensburg bank note.....	\$300.00
April 24, 1865, 2d Greensburg bank note.....	2,700.00
October 19, 1865, O. Tousey, bank note.....	2,258.00
February 7, 1866, O. Tousey, bank note.....	1,000.00
March 22, 1866, Peter F. Hunter.....	1,012.00
May 4, 1866, John M. Watson.....	3,304.70
April 24, 1865, treasury fees.....	348.77
April 24, 1865, orders.....	400.00
October 19, 1865, auditor's fees for 1864.....	255.00
October 19, 1865, Morgan on delinquent.....	22.91
October 19, 1865, T. B. Peery	66.16
May 4, 1866, treasurer's fees.....	322.16
May 4, 1866, auditor's fees.....	100.00
October, 1866, treasurer's fees.....	20.00
July 21, 1866, loaned J. W. Armstrong.....	200.00
July 29, 1866, loaned Amos Miller.....	100.00
August 6, 1866, loaned L. D. Owens.....	100.00
August 8, 1866, loaned L. D. Owens.....	29.00
October 12, 1866, loaned L. D. Owens.....	29.00
October 26, loaned Wm. M. McCullough.....	398.94
October, received of treasurer in notes and ac- counts	576.35
October, treasurer overpaid and refunded.....	25.00
October 26, interest on bank note.....	27.00
October 26, stamp, Hunter note.....	.55
September 26, 1865, stamps for township.....	.50
October 31, stamp on Peery50
October 20, 1864, John Cheek, books and stamp..	12.30
January 27, 1865, stamp, Watson's first note.....	1.65

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January 14, 1865, stamp, Sefton's first note.....	\$1.60
March 6, 1865, Watson's second note	1.85
March 6, 1865, stamp, Sefton's second note	1.50
January 14, 1867, paid on Sefton's note.....	108.00
February 16, 1867, paid on Sefton's note.....	500.00

Total amount paid out.....\$14,064.57
Dated February 20, 1867.

[Signed] JOHN CHEEK, Trustee."

That on the 18th day of October, 1864, said John Cheek, as such trustee, issued, without authority of law, sixteen orders of the following purport, viz.:

"\$1,000. Trustee's office for Sand Creek township, Decatur county, Indiana, October 18th, 1864.

"This certifies that there is due, April 1st, 1865, Jacob F. Robbins, from this township, one thousand dollars, military funds, for value received, with ten per cent., payable as soon as there may be funds on hand.

"JOHN CHEEK, Trustee Sand Creek Township."

And he delivered them to eight several payees, viz.: M. H. Robbins, G. H. Robbins, and others, and that these items of credit, and these fees, and this mismanagement are meant and intended in the alleged libellous matter quoted in the complaint as follows: "However, when the tax was levied they had control of the money and committed and trusted it pretty much up;" that said plaintiff opposed and remonstrated against the levying of said tax, but when it was levied accepted the position of and acted as a member of said committee; that one Michael Taney had applied to the board of commissioners of Decatur county for a license to retail spirituous liquors in less quantity than a quart at a time, and his application, together with a remonstrance thereto, was pending before said board for trial at its session which began on the 1st Monday of March, 1868; that Wren Grayson, one of the members of said board of county commissioners, who lived in said township, and was an active

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participant in the discussion of the matters agitating the people of said township, and resided close to the place where the applicant proposed to retail liquors, was absent on the day fixed for the trial of said application; and when the case was called two only of the members of said board were in attendance, and a division having taken place on a preliminary motion, the case was continued; that the absence of said commissioner excited some comment in the neighborhood, and was discussed by the petitioners and remonstrators.

That the alleged libellous matter quoted, "they succeeded by the absence of one of the commissioners, supposed to have been occasioned by the use of their dollars," was not intended to charge, nor does it charge, said plaintiff with the crime of bribery; that he was one of those who employed an attorney to resist the application of the applicant, and it was his efforts in this behalf, and nothing more, that was charged to him in the article referred to by which they prevented said Taney from pursuing a business authorized by the laws of the State; that the plaintiff attended the Democratic state convention in the spring of 1868, as a delegate, and soon after he came home announced himself as "hell bent against the critter;" that he did take a big drink of brandy at Indianapolis at the convention; that this sudden change in his opinions was noticed by his acquaintances and gave rise to the surmise that he had taken too much at Indianapolis; that said plaintiff, who had been an active participant in party politics in said township for years, was present at a Democratic convention and participated in its deliberations in the spring of 1867, when charges of corruption were made against those managing said military fund, in which Lewis D. Owens was nominated, the recognized personal friend of the plaintiff, and who was subsequently elected to said office and held it till April, 1868; that these well-founded suspicions were still entertained by the citizens of said township; that when the Republican nominating convention assembled in said township, in the spring of 1868, said committee were

present, although four of them (and among that number the plaintiff) were Democrats and presented one of their number, Merrit H. Robbins, as a candidate for trustee; but so strong were the suspicions of the members of that party, of mismanagement of said military fund, that Mr. Robbins, of recognized popularity and ability, backed up by said committee, was defeated, and a candidate pledged to investigation elected; that the Democratic convention was approaching, and that party, the majority party in said township, and the defendant, as a member of that party, at the instance of his neighbors and friends, wrote the article from which the extracts in the complaint are made, to the end that the will of a great majority of the people of said township should be consulted and a candidate pledged to investigation of said affairs elected; that said plaintiff is a man of wealth, numerous relations, and immense power, and it was feared would succeed in controlling said convention, as he desired, and defeat an investigation of the matter of said military fund; that all these acts of the plaintiff and the committee, of which he was a member, were such as to fix in the minds of a large majority of the people of said township the well-founded suspicion that there had been mismanagement of said military fund, and the defendant, as a citizen of said township interested in the officers elected over him, without malice, ill-will, or improper motives toward the plaintiff, wrote the article from which the extracts in the complaint are taken, for himself and others, and subscribed thereto the signature of "Fair Play," for the public good; that the matters stated in the article concerned all the people of said township, and were such as he claims the right to publish upon the facts stated as a privileged communication. Said article is copied and a copy thereof hereto attached and made a part hereof. (See copy in the former part of this answer.) That said article (aside from its allusions to political opponents, which do not apply to the plaintiff) was based upon the facts above alleged; if it contain any mistakes, they were caused by the plaintiff's own conduct, and he is therefore legally estopped from asserting a claim

for damages for mistakes occasioned by his own conduct; and the defendant demands judgment for costs. No question is made as to the ruling of the court on the fourth paragraph of the answer, and it is therefore omitted.

Paragraph 5. The defendant for fifth and further answer herein, says that he admits that he wrote the article, extracts from which are set out in the plaintiff's complaint herein, but he says that said extracts, and the interpretation thereof given in the complaint, do not express its meaning; that said article entire is as follows: (For copy of article see paragraph 2 of this answer.) He says he wrote said article because it is true, and he hereby affirms the truth of so much of said article as is set out in the complaint. He says that the sum of \$17,000 was all that was paid for the credits procured by said committee, by which said township was relieved of the draft; that twenty-six orders of \$100 each were issued by John Cheek, one of said committee, and trustee of said township, and delivered to the men drafted under said call, and that to pay said orders and to relieve said township from said draft, said committee procured the trustee of said township to levy military taxes amounting to \$17,286.60, which were passed to the tax duplicate of the county for collection, and at least \$6,787.80 was paid to said committee as a military fund, making the sum of \$24,074.40 of a fund under their control; that said committee purposely, fraudulently, and through favoritism caused the taxes of Robert Cones, Ludlow Johnson, and Sandford Elliott not to be collected, which taxes were legally assessed against them severally; that of said fund they paid or caused to be paid out \$400 on illegal orders, which orders were known by them to be illegal at that time; \$1,304.90 on fees of officers for its collection, when no such fees were allowed by law, and never accounted for \$6,000 of said fund; and that without authority they loaned \$1,904.29 of said fund, for which they obtained credit in their settlement of account with the board of commissioners of said county; that said plaintiff received as payment of the

donation of Rufus Brunton, one field of corn at \$75, and for which he only accounted to said fund in the sum of \$40; that the question of levying said taxes was twice submitted to the people of said township, and at the first submission the plaintiff opposed the levying of a tax, and on the second occasion favored it, on condition that the drafted men would contribute a part of the fund necessary to relieve the township; that no part of said twenty-six orders were paid at said date, and he, therefore, says that it is true that "during draft times said plaintiff and others did everything in their power to prevent the township from being taxed for the relief of drafted men, and partly succeeded on the last draft. However, when the tax was levied they had control of the money, and committed and trusted it pretty much up; at any rate the twenty-six drafted men, who got a township order each for one hundred dollars (although that amount was levied and collected of the people), never received one cent of the money;" that said plaintiff and three of his colleagues on said committee were Democrats; that he was an active participant in the conventions of his party in said township; but he and his colleagues attended the Republican convention in said township in the spring of 1868, and used their influence to induce the convention to nominate Merrit H. Robbins, one of said committee, for township trustee, at the approaching election, for the purpose of covering up their said record in said township business; that one of the questions agitating said township at that time was whether or not the conduct of said committee should be investigated, and that said Robbins was opposed to said investigation; and the defendant affirms that it is true that the plaintiff and his colleagues "were on hand at the Republican convention, using their influence to induce the Republicans to nominate one of their number, that they could depend upon to cover up their former rascality in the management of said fund," and that they had "a bad record, one that would not bear bringing to light," and professed to be opposed to the granting of a license to retail liquor, and called

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the persons in favor of investigation "whisky men," as a whisky "bugbear," for the purpose of directing attention from it; that on the day the application of said Taney was set for hearing before the board of commissioners of said county, said Grayson was absent, and the application of said Taney was continued, a division having taken place on a preliminary motion; that the absence of said Grayson was procured by the said remonstrators who caused a telegram to be sent to said Grayson from a point on the line of the Indianapolis, Cincinnati & Lafayette railroad, west of Greensburg, on that day, summoning him hence on what he supposed to be important business; that said plaintiff was one of the remonstrators, and that prominent Republicans of said township were remonstrators also, with whom said plaintiff had frequent conferences, and the defendant therefore affirms that it is true, "that they have spent some weeks in company with prominent Black Republicans of said township to prevent" said Taney, who was a Democrat, "from pursuing a business authorized by the laws of the State and the platform of his party; and they succeeded by the absence of one of the commissioners, supposed to have been occasioned by the use of their dollars;" that in the spring of 1867, one Lewis D. Owens, the choice of the plaintiff, and of said committee, was nominated, in the Democratic township convention, for township trustee, in which convention frauds were charged against said committee, after he had pledged himself to investigate the action of said committee in the matter of said township fund, and which pledges he did not redeem; and that he was elected by less than the usual Democratic majority, wherefore the defendant says that it is true that "they succeeded last spring in forcing one of their clan upon the people for trustee, and by his false promises to investigate these frauds of Cheek and others" (meaning the matters before in answer alleged) "got elected by a reduced majority;" that the Democratic state convention, in the year 1868, was attended by said plaintiff, as a delegate from said township, and passed a resolution against laws prohibiting the sale of lager beer on Sun-

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day, and against those laws which restrict the Germans from their Sunday recreations, which was known as the "whisky plank," and from that time hence said plaintiff was, and is, opposed to the granting of a license to retail liquor, and while attending said convention was exposed to an opportunity to use excessively that kind of stimulants known as "red eye," and did take too much of that article; and the defendant alleges that it is true that "chief among them;" (those of whom the communication speaks "was our delegate to the state convention, a good friend of whisky at the time of said convention, but hell bent, according to his own declarations, against the critter at the date of said communication, which change was occasioned by an overdose of something at the state convention." Wherefore said defendant says that said article thus construed is true, and is the article written by the defendant, and that it was written without malice and in good faith, and so understood by those who read it, and this he is ready to verify.

The plaintiff filed a motion to strike out the fifth paragraph of the answer, which was rightfully overruled. The plaintiff then filed separate demurrers to the second, third, fourth, and fifth paragraphs of the answer for want of sufficient facts to constitute a defence.

The demurrer was sustained to the second, third, and fourth paragraphs of the answer, and overruled as to the fifth paragraph. Proper exceptions were taken, and the sustaining the demurrers to the second and third paragraphs of the answer is assigned for error. Was sustaining these demurrers error?

It is true that in this State the truth of libellous matter may be given in evidence in justification. Const. Ind., art. 1, sec. 10; 2 G. & H. 110, secs. 86, 87. And, as a consequence, it may be pleaded; but how must it be pleaded? is the question. These answers say that the defendant "wrote the article because it is true," in the second paragraph, and in the third it says, "that so far as the plaintiff is concerned, it

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is a true and lawful publication," without affirmatively charging the plaintiff with the wrongs, which he, in his complaint, says were charged against him. In an answer, in order to make it a good justification, the defendant must specifically point out the acts of which the plaintiff was guilty, in order that the court may see whether the defendant was justified in what he published. *Johnson v. Stebbins*, 5 Ind. 364; 1 Starkie Slander, 477; 1 Hilliard Torts, 429, etc. These paragraphs fall greatly short of this requirement, and the demurrers were properly sustained to them.

The court allowed the plaintiff, over the objection of the defendant, to prove by witnesses who and what they understood certain words in the published article to mean and refer to. This was allowable, and its correctness is sustained by numerous authorities. *Smauley v. Stark*, 9 Ind. 386; *Justice v. Kirlin*, 17 Ind. 588; *Proctor v. Owens*, 18 Ind. 21; *Miller v. Butler*, 6 Cush. 71; 1 Hilliard Torts, 305. The plaintiff had alleged, as a matter of fact, what their meaning was, and he had a right to prove his allegation.

There was a reply of general denial to the fifth paragraph of the answer, which made the issues under it and the general denial.

Trial by jury; verdict for the plaintiff for one hundred and seventy-five dollars; motion for new trial overruled, and judgment on the verdict.

We have examined this record and the briefs of both parties carefully, and we are satisfied that no error was committed in the court from which this case came, to the prejudice of the appellant, and as sec. 101, 2 G. & H. 122, says "the court must, in every stage of the action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, and no judgment can be reversed or affected by reason of such error or defect," it is our duty to say that no substantial or legal right of the appellant has been affected by the action of the court below.

The judgment is affirmed, at the costs of the appellant.*

Holler v. The State.

N. Trusler, J. S. Scobey, C. Ewing, J. K. Ewing, and W. O. Foley, for appellant.

W. Cumback, S. A. Bonner, J. Gavin, and J. D. Miller, for appellee.

*Petition for a rehearing overruled.

HOLLER v. THE STATE.

CRIMINAL LAW.—Murder.—Possession of Weapon by Deceased.—Proof of Threats by Deceased.—On a trial for murder, in which the witnesses for the defence had testified that the deceased had a bowie-knife in his possession the night of the murder, and the State had introduced evidence to show that he had no such knife, and the defendant proposed to prove threats made by the deceased when the knife was exhibited, and also when it was not shown, against the life of the prisoner, or of injury to him, some of which threats were not shown to have come to the prisoner's knowledge;

Held, that evidence of the possession of the knife by the deceased a short time before the date of the occurrence which resulted in his death, was proper for the consideration of the jury, and also evidence of the threats made by the deceased, whether known to the defendant or not, and either when exhibiting the knife or at other times.

SAME.—Impeachment of Rebutting Witness.—Although a witness has been cross examined, on his original examination by the State, yet, if he is again introduced by the State and examined in rebutting, it is proper to lay the foundation then for his impeachment upon any evidence then given for the State, and to subsequently introduce witnesses for that purpose.

APPEAL from the Wayne Criminal Court.

DOWNEY, J.—The appellant was indicted, with his brother, for murder in the first degree, in killing one Nathaniel Tibbetts, on the 17th day of October, 1864, in Wayne county.

He was tried at the October term, 1871, found guilty of manslaughter, and his punishment fixed at ten years' imprisonment in the state prison. He moved for a new trial, for the reasons, among others, that the court had improperly excluded certain evidence offered by him; that the court

37	57
130	229
87	57
149	404
87	57
164	670

had misdirected the jury, and had improperly refused to instruct the jury, as prayed for by him; that the verdict of the jury was contrary to law, and not sustained by the evidence.

This motion was overruled by the court, and judgment was rendered against the defendant upon the verdict.

The evidence, and also the instructions, are set out in bills of exceptions in the record. There are twelve alleged errors assigned, all of which, with one exception, are simply reasons for which the court might have granted a new trial, if deemed sufficient. Only one, that is the second, which alleges that the court erred in overruling the defendant's motion for a new trial, raises any question for our consideration. This assignment requires us to examine the reasons urged in the criminal court for a new trial, which we proceed to do.

The State's theory of the case, as developed by her evidence, was, that the deceased and his sons Jacob and William, at about seven o'clock in the evening, were at the store of Lyner, in the town of Abington, and started to go home. The defendant was sitting in front of the store on a horse-block. Afterward his brother Granville joined him. When the deceased and his sons got part of the way home, and near an alley and barn, the defendant and his brother came out around the barn, and the defendant said to the deceased, "Tibbetts, God damn you, what did you strike me the other night for?" Deceased spoke, and said, "Francis, I thought you were injuring my boy, or I should not have struck you." The deceased stepped on about two steps, when defendant said, "God damn you, I'll show you," and drew up and hit him with a rock. The defendant was within about two steps when he threw at him. When defendant threw the stone, Granville Holler said to Jacob Tibbetts, "God damn you, don't you interfere;" and as Jacob went on toward home, he threw stones at him. The stone thrown at the deceased struck him on the back part of the left side of his head, and he immediately fell to the ground. The

defendant went up to him, and stood over him, after he fell. The other son ran home. The deceased was carried to his home in an unconscious condition, and died from the effects of the injury at four o'clock next morning. The stone thrown, and which struck the deceased, would have weighed two pounds.

The defendant's theory of the case, as testified to by his brother, supported, perhaps, to some extent by others, was that the deceased came to the barn where he and his brothers were, and where they, or one of them kept a horse, or horses, accompanied by his two sons. The deceased said, "Here is the son of a bitch now." The defendant said, "Why do you jump on me now, when you and your crowd jumped on me the other night and beat me up?" The deceased said, "I'll settle that with you, and that pretty damned quick," and drew a bowie-knife from his person. The defendant said, "Tibbetts, you are not going to strike me with that knife, are you?" Tibbetts said, "Yes, I'll cut your damned guts out of you." As he said this he advanced two or three steps toward the defendant, and then halted. He motioned with his hand, and said, "Come up, Jake." While his head was turned, the defendant stooped and picked up the stone and threw it at the deceased, knocking him down. He was eight or ten feet from the defendant when the stone was thrown. The defendant did not advance toward the deceased. Jacob Tibbetts, when his father called to him to come up, had a revolver in his hand, which he drew from his belt. These opposite statements of the facts are taken from the testimony of the principal witness on each side of the case.

Two or three days before the killing of the deceased by the defendant, a difficulty had taken place in which the deceased had beaten the defendant with a gun-swab; and this was the occurrence referred to in the conversation between the parties at the time of the killing.

It was testified that, after this affair, and, of course, before the killing of Tibbetts, he made threats of further violence

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toward the defendant, which had been communicated to the defendant.

It became a question, on the trial, whether or not the deceased had a bowie-knife at the time when he was killed. His son had testified that he had not, and that he did not own any such knife.

The defendant offered to prove by Isaac Hunt, a competent witness, that between the time of the beating with the gunswab and the time of the killing of the deceased, the witness saw the deceased have a bowie-knife, with a blade six or eight inches long, and that he said, at the time, that he intended to kill the defendant with it. This evidence, both as to the possession of the knife, and as to the declaration or threat of the deceased, was excluded by the court. He offered to prove the same facts by Reuben Robbins, with reference to the possession of the knife by the deceased, and his threats as to what he intended to do with it. This evidence was also excluded.

He proposed to prove by other witnesses threats of violence to the defendant, made by the deceased, not connected with the possession and exhibition of the knife, within two or three days previous to the killing, which were also excluded. To all of these rulings there were proper exceptions.

It was not shown that these threats of the deceased were communicated to the defendant before the killing, and it was on this ground, we presume, that the learned judge who presided at the trial excluded the evidence. We infer that this was the ground of the exclusion, for the reason that such threats as had been communicated to the defendant were admitted in evidence.

As the defendant's witness had testified that the deceased, on the night when he was killed, had a bowie-knife, and the State insisted that he had not, we think the possession of such a knife by the deceased, so shortly before the occurrence, was proper evidence to go to the jury; and as to the threats made, both when the knife was produced, and when

it was not, we think they were admissible in evidence without reference to whether they had or had not been communicated to the defendant. If the defendant had made previous threats of killing the deceased, it is very clear that they would have been admissible in evidence, and we cannot see any good reason why the threats of the deceased, against the defendant, are not also competent evidence.

In *Cornelius v. Commonwealth*, 15 B. Mon. 539, "in a trial of a prisoner charged with murder, he proved threats on the part of the person killed to kill him, which threats had been communicated to the prisoner. He then offered to prove other threats not communicated, which the court refused to admit. Held by the court of appeals, that it was error to exclude such proof; its tendency was to confirm the proof of the threats already proved, and to show the intention of the deceased to attack the prisoner."

In *Campbell v. The People*, 16 Ill. 18, upon the trial the defence offered to prove that on that day, and at other times shortly before his death, the deceased had made threats against the prisoner. This evidence the court ruled out, and an exception was taken. The Supreme Court say: "In this the court unquestionably erred, although they may never have come to the knowledge of the defendant till after the homicide was committed. If the deceased had made threats against the defendant, it would be a reasonable inference that he sought him for the purpose of executing those threats, and thus they would serve to characterize his conduct toward the prisoner at the time of their meeting, and of the affray. If he had threatened to kill, maim, or dangerously beat the defendant, it would be a fair inference, especially so long as the evidence shows that he had a hatchet in his hands, that he had attempted to accomplish his declared purpose, and if so, then the prisoner was justified in defending himself, even to the taking of the life of his assailant, if necessary. While the threats, of themselves, could not have justified the prisoner in assailing and killing the deceased, they might have been of the utmost importance in connec-

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tion with the other testimony in making out a case of necessary self-defence. The evidence offered was proper, and should have been admitted."

In *Keener v. The State of Georgia*, 18 Ga. 194, Reese, the deceased, had made threats against the defendant to one Cosby, who was called as a witness; the testimony was rejected, mainly on the ground that the threats had not been communicated to the defendant prior to the killing of the deceased. In the opinion of the court, delivered by LUMPKIN, J., they say: "Without stopping to inquire whether the facts related by the witness, apart from the threats, were not admissible, we prefer to confront the question directly; and to consider whether or not the evidence of Cosby, taken as a whole, should not have been received. Keener is indicted for killing Reese; his defence is, that Reese manifestly intended, by surprise or violence, to take his life, or do him some bodily hurt; that the circumstances were such as to excite the fears of a reasonable man; and that he acted under the influence of those fears, and not in the spirit of revenge. The proof is, that two nights before the tragedy occurred, Reese entertained the most deadly hostility toward Keener. Jealousy, another name for insanity, of the most malignant character, had taken possession of his bosom, and was shaking the throne of his reason to its very foundation. Keener had taken his woman from him, and if the damned coward ever crossed his path he would kill him; he was going out on McIntosh street before long, and would kick up hell there. Prophetic words! He sowed to the wind, and reaped the whirlwind. What a terrible lesson! Well might the wise man say of the house of the strange woman, 'The dead are there.'

"Ought not this conversation, whether communicated to Keener or not, to have been admitted as a substantive fact to show the *malus animus*, or evil intent, toward Keener, with which Reese went to that house that night? Laying aside all technical rules and reasoning, we ask, with the knowledge of the mind and feelings of the deceased disclosed by this

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witness, would we not, and ought not the jury, to listen more indulgently to the alleged apprehension of injury on the part of Keener, as well as to the facts and circumstances upon which he relies to justify his conduct? Do not these previous threats throw light upon Reese's conduct, up to the time of the killing? Do they not serve to illustrate the transaction?"

After an examination of authorities, the learned judge concludes on this point as follows: "Upon the authority of the note, then, as laid down by Mr. Starkie and others, and as illustrated by numerous adjudicated cases, we are clear that the testimony of Cosby should have been admitted, as it conduced to prove, in connection with other evidence, the *quo animo* with which Reese resorted to the brothel on McIntosh street that night; and that his manner and conduct corresponded with that purpose, so as to warrant Keener in believing that the same scenes were to be repeated there that night which had been re-enacted several times before, and that no alternative would be left but to retreat again, as he had done before twice or three times, or take the consequences.

"In view, then, of the frequent failure of justice from the failure of evidence, and thoroughly convinced, as we are, that no competent means of asserting the truth ought to be neglected, we think the testimony of James Cosby was improperly ruled out. It was pertinent to the issue, and ought to have been submitted to the jury. It showed the intent with which Reese resorted to this brothel, and also his feelings toward the defendant."

In *Stewart v. The State*, 19 Ohio, 302, it was held "competent for the defendant to prove that the person alleged to have been murdered, and others, had agreed to go to the house where the defendant boarded, for the purpose of quarreling with him, and that they had approached him with that intent at the time the affray commenced, which resulted in the homicide; and to prove the conversation of the parties in relation to such agreement, though the defendant had not

been informed of the intent of the parties, in approaching him."

In *Dukes v. The State*, 11 Ind. 557, this court say: "As a general rule, it is the character of the living—the defendant on trial for the commission of crime—and not of the person on whom the crime was committed, that is in issue, and as to which, therefore, that evidence is admissible. But in a case like the present, when the question arises whether the accused acted, in the commission of a homicide, upon grounds that justify him in the deed, it would seem that the character of the deceased might be a circumstance to be taken into consideration. Especially might this be the case where the accused knew that character, and also knew, at the time, the individual by whom the attack upon him or his property was made." The court adds: "Where, as in this case, these facts may not have been known, we do not see how the evidence could be entitled to much weight."

In this case, according to the report, it was evidence of the character of the deceased, offered by the State, of which the court was speaking, and not evidence of threat.

For a reference to numerous cases on the subject of proving the known character of the deceased for turbulence and violence, in cases where the defendant relies on the ground of self-defence, see case of *Pfomer v. The People*, 4 Park. Cr. 558.

Jacob Tibbetts was examined by the State, as a witness, in her original or opening evidence, and after the defendant had concluded his evidence in answer to the State's evidence, the State again called him as a rebutting witness, and he testified that his father had not, on the evening of the tragedy, any bowie-knife in his possession. The defendant, on cross examination, asked him if he had not, at a time and place named, to a designated person, stated that his father had a bowie-knife at that time, and indicated upon his hand the length of the blade, and he denied having made such statement. After the State had closed her rebutting evidence, the defendant proposed to prove, by a competent witness, that

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Jacob Tibbetts did make such contradictory statement, which the court refused to allow him to do.

We cannot imagine on what ground this evidence was excluded. If it was because the witness had been examined by the State in her opening evidence, the ruling was wrong. His testimony may not have been regarded of such a character as to require or make it expedient for the defendant then to enter upon his impeachment. The impeaching witnesses may not have been at hand, or there may have been some other reason for not then impeaching him. But when he again came upon the stand and testified against the defendant in a matter so vital to him, we are clear that he then had the right to impeach him in the manner proposed. A rebutting witness may be impeached as well as a witness introduced in the opening of the evidence. The proper foundation seems to have been laid by interrogating the witness as to the time, place, and person involved in the supposed contradiction, and we think the court erred in refusing to allow the impeachment of the witness.

There are many other points made to show that a new trial should have been granted, but we need not examine more of them.

The judgment is reversed, and the cause remanded for further proceedings, and the clerk is directed to certify to the warden of the state prison to return the prisoner to the jail of Wayne county.

W. A. Peelle and *H. C. Fox*, for appellant.

B. W. Hanna, Attorney General, for the State.

Dinwiddie *et al.* v. The President and Trustees of the Town of Rushville *et al.*

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165 396

DINWIDDIE ET AL. v. THE PRESIDENT AND BOARD OF TRUSTEES OF THE TOWN OF RUSHVILLE ET AL.

TRUSTEES OF TOWNS.—*Election.*—*Inspector.*—*Injunction.*—Where the inspector of an election for town trustees did not, within ten days after said election, or at any other time after said election, over his own signature, certify and file in the clerk's office of the circuit court of the county where the election was held, a certificate certifying the several persons elected at said election, to fill the several offices of said town;

Held, that an ordinance passed by the persons so elected gave no authority for an improvement in the town at the expense of the property holders, and that an injunction should be granted on their application.

APPEAL from the Rush Circuit Court.

WORDEN, C. J.—This was a complaint by the appellants against the appellees to enjoin the making of certain improvements in the town of Rushville, at the expense of the property holders, under an ordinance passed by the corporate authorities.

Demurrer to the complaint sustained, and exception. Judgment for defendants.

There are several grounds stated in the complaint on which the injunction was asked, but we find it unnecessary to examine more than one of them, which of itself was sufficient. The statute on the subject of towns, and the election of the officers thereof, etc., provides, that "it shall be the further duty of such inspectors to make a certified statement, over their own signatures, of the persons elected to fill the several offices in said town, and file the same with the clerk of the circuit court, in the county thereof, within ten days from the day of such election, and no act or ordinance of any board of trustees chosen at such election shall be valid until the provisions of this section are substantially complied with." 1 G. & H. 622, sec. 16.

It is alleged that the inspector of the election (at which the trustees passing the ordinance were elected) "did not, within ten days thereafter, or at any other time since said election, over his own signature, certify and file the same in

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the clerk's office of the circuit court of said Rush county, any certificate certifying the several persons elected at said election to fill said several offices of said town, to wit, trustees and marshal."

The language of the statute quoted is quite clear, and does not admit of any construction by which, where its terms have not been complied with, an ordinance can be upheld. As was said in *Stayton v. Hulings*, 7 Ind. 144: "Where a statute expressly prohibits a thing, until another has been done, the prohibition cannot be disregarded without judicial legislation." The only doubt we have had on the subject is whether the provision quoted was intended to apply to the first election only, or to subsequent elections also. Upon looking through the statute we find nothing in the context that justifies the conclusion that it was intended to apply to the first election only, but there are some things that indicate an intent on the part of the legislature to make it applicable to all elections.

We must hold that the ordinance is void, and that the improvements are being made without competent legal authority. An injunction in such case is a proper remedy; inasmuch as the title to the plaintiffs' property may be clouded by an apparent lien for the expense of the improvements. The demurrer to the complaint should have been overruled.

The judgment below is reversed, with costs, and the cause remanded for further proceedings.

F. Bigger, for appellants.

ALLEN v. SHARPE ET AL.

PROMISSORY NOTE.—*Indorser*.—*Forged Indorsement*.—The acceptance in good faith, from the maker, who is insolvent, of a note with a forged indorsement

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of the name of the payee, in discharge and payment of a note executed by the same maker, with the genuine indorsement of the same payee, known to the holder as an accommodation indorser, will not discharge such indorser on the original note.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—Suit by the appellees against the appellant, on a promissory note, payable in bank, made by Layton Mills, payable to Moses Allen, and indorsed by him to the appellees. The further facts stated in the complaint are, that when the note matured, Mills brought to the plaintiffs, at their bank, another note for a like sum, made by him and payable to the order of said Allen, thirty days after date, and upon the same terms as said first note, which then and there had upon the back of it what purported to be, and Mills represented to be, the indorsement of said Allen; that upon the faith that said indorsement was genuine and authorized, the plaintiffs surrendered to Mills the first note, and took in lieu of it the last named note; that the indorsement was forged, and Allen refuses to recognize the same; that said first named note remains unpaid, and is in the hands of defendant or of the representatives of Mills, who is dead; that at the time the second note was substituted for the first, Mills was insolvent, and the same was received solely upon the faith that the defendant, who was solvent, had indorsed the same, etc.

The defendant demurred to the complaint, and his demurrer was overruled. He then answered, stating in addition to the facts disclosed in the complaint, that he indorsed the note for the accommodation of Mills, who got the money on the same, which was known to the plaintiffs; that the last note was received by the plaintiffs in satisfaction of the note in suit, without the knowledge or consent of the defendant; that he did not know, for fifteen days, that the note sued on was claimed by the plaintiffs as not paid, but during that time he supposed it had been paid by Mills, and he avers the fact to be that it was paid and satisfied as aforesaid; that at the time of the acceptance of the second note, the plaintiffs can-

celled and surrendered up to Mills the first note; wherefore, etc.

The plaintiffs demurred to this answer, because it did not state facts sufficient to constitute a defence, and their demurrer was sustained. The defendant excepted.

The point presented by the assignment of errors, which calls in question the correctness of the decisions of the court in overruling the demurrer to the complaint and in sustaining the demurrer to the answer, is this: Were the delivery by Mills to the plaintiffs of the second note, with the name of Allen forged thereon, Mills representing it as genuine, and its acceptance by the plaintiffs as payment of the note on which the action is predicated, Mills being then insolvent, and the plaintiffs relying exclusively on the liability and solvency of Allen, a good defence to the action?

We think that neither upon reason nor authority can these facts be held to be a satisfaction of the note on which the action is predicated.

The alleged satisfaction was not made by Allen. He, however, sets up what was done by Mills as amounting to a satisfaction. He ratifies and approves what was done by Mills, and claims that it discharged the note. Like a principal who ratifies an unauthorized act of his agent, he seeks to give it effect, and make it operative, and to claim the benefit of the act. If he would ratify and adopt the act of Mills, he must adopt it in whole. He must be held as making Mills his agent, and as adopting all the parts and attending circumstances of the transaction. He cannot present and rely upon such part or parts of the transaction as are favorable to him, and reject the residue. While he adopts and relies upon the delivery of the second note by Mills, as a satisfaction of the note in suit, he must also adopt, ratify, and make his own the falsehood and fraud of Mills, in representing the indorsement upon the second note as genuine, which must have the effect of taking away from the transaction every semblance of a satisfaction. The appellees did not agree to accept a note on which Mills alone was liable, and he insolvent. What they

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contracted for was a note on which Mills was liable as maker and Allen as indorser. This they did not get, and they are, consequently, not bound by the promise to take the worthless note, and surrender up their right of action upon the first note. Allen, having refused to recognize or admit any liability on the second note, cannot set up the giving of it by Mills as a bar to a recovery on the first one. It seems to be supposed, however, that Allen has some ground to complain, because "he did not know for fifteen days that the note sued on was claimed by the plaintiffs as not paid, but during that time he supposed it had been paid by Mills." What harm was done him, or what damage accrued to him from this ignorance? Mills was insolvent. If Mills had been solvent, and by the lapse of time Allen had lost an opportunity to save himself from loss as his indorser, there would have been some reason for urging this point. But without such a showing the argument is destitute of force.

In *Bell v. Buckley*, 11 Exch. 631, the action was upon a bill of exchange. There was a plea of payment, and issue thereon. The evidence, on the trial, disclosed the facts to be that the alleged payment consisted in the delivery to the plaintiff of another bill of the same parties, as appeared, but on which the acceptance was forged. The bill was in that case, as the note was in this, accommodation paper. There the principal in the transaction had become bankrupt, and absconded. Here the principal had become insolvent. It was submitted, in that case, on the part of the plaintiff that the facts did not amount to a payment of the bill. The learned judge was of that opinion, and a verdict was entered for the plaintiff for the amount of the bill and interest, leave being reserved to the defendants to move to enter a verdict for them. Upon a rule nisi, after a full discussion of the question, ALDERSON, B., said: "The rule must be discharged. The only question is, whether the defendant has made out that this bill was paid by Thornley. It appears that the day before the bill became due, Thornley came to the bank, and, there being another bill of his due that day, he requested

the manager to 'retire' those bills by discounting two other bills which he brought with him. The manager consented; and for the purpose of retiring the bill for which this action is brought, Thornley gave to the manager a bill for the same amount, and apparently between the same parties, the present defendant being supposed to be the acceptor. It turned out, however, that it was a bill upon which no action could be maintained against the defendant, since the acceptance was a forgery. The transaction is simply this: the bank take up the bills, and charge in account with Thornley the amount which the discount would have been if it had been discounted by a third person, and they give him credit for the amount of the forged bill, minus the discount. That is no payment of the other bill. Then it is suggested, on the authority of *Clayton's Case* that inasmuch as Thornley paid moneys into the bank after the bill was due, they must be taken as paid in discharge of that bill. But where there is an account on the one side of sums owing, and on the other of sums paid, there is no presumption that the items of payment are in respect of the items owing; it depends on the fact of actual appropriation."

PLATT, B., said: "I am of the same opinion. In order to retire the other bill, the bank discount the forged bill, and give Thornley credit for the amount, minus the discount. That is no payment of the former bill, but a mere substitution of one bill for another, for the purpose of giving the debtor an ulterior day of payment."

MARTIN, B., said: "I am of the same opinion. The case, when understood, is perfectly plain. It is an action against the acceptor of a bill of exchange; the plea states that it was accepted for the accommodation of Thornley, and it goes on to allege that Thornley paid the amount. The defendant must, therefore, establish that fact. Then, what is payment of a bill? It is argued that the delivery of one bill to 'retire' another is payment; in one sense it may be, but the meaning of payment in this plea is an equivalent amount of money given by the debtor to the creditor in satisfaction of

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his claim on the bill. Then what are the facts? The day before the bill becomes due, Thornley goes to the manager of the bank, and induces him to take up the bill, by giving him another bill which turns out to have a forged acceptance. That is no payment. Suppose Thornley had said to the manager of the bank, 'A. B. owes me a sum of money, and here is a document by which he admits the debt, take it and get the money, and pay the bill which you hold of mine;' that the manager assented, but, on going to A. B., found that the document was a forgery, could it for one moment be contended that there was any payment of the bill? That, however, is this identical case, the only difference being, that here the manager of the bank agreed to accept a document not payable immediately, but at the expiration of three months. Then it is said that the case is one of hardship on the defendant, who is a mere surety; but assuming that the plaintiff was bound to consider him other than the principal debtor, even if this had been an action not upon the bill itself, but against him as a surety, I think that he would have had no defence. It is also said, that it is a case of hardship, because the defendant, not having been called upon, would naturally suppose that the bill was paid. But a person being under the idea that a bill is discharged, when it is not in fact discharged, nevertheless remains liable. According to my view of the case, there is not a scintilla of evidence of payment of the bill, in the sense in which that term is used in the plea; the entries in the bank books are nothing more than a mode of keeping the accounts by debits and credits."

In *Wait v. Brewster*, 31 Vt. 516, the court, in discussing what amounts to satisfaction of a note, say: "Ordinarily, a note given for a previous debt is *prima facie* payment of such debt. The law supposes that the parties intended to extinguish the old debt and leave no right of action except upon the note." "But," say the court, "if the parties stipulate that the note shall not have that operation, then their agreement governs, and the antecedent cause of action still

subsists. Other limitations of the general doctrine will appear from an examination of the authorities above cited. Thus it has been held that when the party takes the note under a misapprehension as to facts, he supposing that other parties are bound by it who are not, then the intention of treating it as payment is rebutted, and the party may sue upon the original debt."

We are referred by counsel for appellant to *The Pres., etc., of the Gloucester Bank v. The Pres., etc., of the Salem Bank*, 17 Mass. 33, where it was held, that "where a banking company paid notes, on which the name of the president had been forged, and neglected for fifteen days to return them, it was held that they had lost their remedy against the person from whom the notes had been received." This case is wholly unlike the one under consideration. There the party who presented to the bank the forged bills was an innocent party, and it was important to him to have the bills returned at once, if they were not genuine, so that he might return them to the party from whom they had been received. And in addition to these facts, the forged signature was that of the president of the bank, which received and paid the bills, and must be presumed to have known immediately of the spurious character of the bills.

We are also referred to *Coggill v. The American Exchange Bank*, 1 Comst. 113, but have been unable to see its force as an authority in the case under consideration.

Professor Parsons, in his work on notes and bills, is cited by appellant. He says: "As money paid under a mistake of fact may always be recovered back, one who pays money on forged paper, by discounting or cashing it, for example, can always recover it back, provided he has not contributed to the mistake himself, materially, by his own fault or negligence, and provided that by an immediate or sufficiently early notice, he has enabled the party to whom he paid it to indemnify himself as far as possible." 2 Pars. Notes and Bills, 597. Why can he recover it back? Simply because there was no consideration for its payment. He

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supposed he was getting a valid and genuine instrument, when, instead, he got a forged and worthless piece of paper. Suppose, instead of having paid money for the forged paper, he had given up a note or bill which he held, would there be any consideration for that act? Would he be bound to lose his right of action any more than he would be bound to lose the money which he had paid for the forged paper? Surely not.

We are satisfied that there is no error in the record in this case.

Judgment affirmed, with costs.

N. B. Taylor, E. Taylor, and W. Wallace, for appellant.

A. G. Porter, B. Harrison, and C. C. Hines, for appellees.



HOTCHKISS v. OLMSTEAD.

SLANDER.—*Charge of Forgery.—Attempt to Obtain Money by False Pretences.*

The plaintiff, having executed a note to the defendant, November 30th, 1864, and paid one year's interest, after a year had passed executed a mortgage to secure the payment of the note, and some four years later, on discharging the note and mortgage, which were surrendered to the plaintiff, the interest from the date of the note was, by mistake, included, and no credit given for the one year's interest paid. The plaintiff called the attention of the defendant to the mistake afterward, and pointed out the words in the mortgage referring to the note, "Interest paid to Nov. 30th, 1865." The plaintiff filed a complaint, which, after reciting these facts, and averring that the purpose of defendant was to cause it to be believed, and that the hearers so understood, that the plaintiff had been and was guilty of forgery, and of making use of false pretence, to obtain money, charged, with proper innuendo, that defendant had uttered and published of him the following false and slanderous words: "You forged it, inserted it, put it in. You wrote that clause in it. I would swear that that line in the mortgage was not in the mortgage when I gave it to you yesterday, and you put it in. You altered the mortgage, changed the mortgage, put that line in the mortgage, inserted that line, put the credit in, and you are a forger and committed forgery;" and also: "He committed forgery, is a forger, is guilty of forgery. There is something here that I don't understand; this line has been put here; or at least if I was called on to swear, I would swear that I read the whole of the mortgage over very

37	74
147	696

37	74
155	500

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carefully, and I did not read that. I let Hotchkiss" (the plaintiff) "have the mortgage once, and I never noticed that until after he brought it back. It is his handwriting. I told him so. I suppose he says he is going to sue me for it, but it is my belief. He can't hurt a person for his belief. Hotchkiss is so slippery I have had to watch him. He cheated me out of some money, which he positively agreed to pay, and I am not going to let him cheat me any more. I am positive this was not here when I gave him the mortgage. He put it there; it is his handwriting; I told him so; he can't hurt me for that. He can't hurt a man for his opinion, unless he says he can prove it. I have never said I could prove it. He must have put that line in the mortgage. I am certain it was not there when I gave him the mortgage."

Held, that the entry charged, on the mortgage, had the force and effect of a receipt for so much money, and, although surrendered, was a valid instrument as such receipt, and capable of being forged, and the paragraph showed a charge by defendant against plaintiff of forgery. It did not state a charge of obtaining money by false pretences. The attempt charged was not a crime.

SAME.—A second paragraph charged a conversation in respect to the same transaction, but it alleged the alteration was made before execution and delivery of the mortgage, and, therefore, no forgery could have been then committed.

APPEAL from the Switzerland Circuit Court.

BUSKIRK, J.—The only question which is presented by the record in this cause arises upon the action of the court in sustaining a demurrer to the first and second paragraphs of the complaint.

This was an action of slander, brought by the appellant against the appellee. The complaint was in two paragraphs. The appellee demurred separately to each paragraph. The demurrer was sustained, and the appellant refusing to amend, judgment was rendered on the demurrer for the appellee. The appellant excepted, and brings the case here to obtain a reversal of the judgment of the court below in sustaining the demurrer to the complaint. To make the ruling of the court below and the decision of this court intelligible, it will be necessary to reproduce each paragraph of the complaint.

The complaint was in these words: 1. The plaintiff complains of the defendant, and says that on the 30th day of November, 1864, the plaintiff executed to the defendant the promissory note, a copy of which is filed herewith, and having paid thereon the interest for one year, he did, on the 15th day of December, 1865, execute to said defendant a mortgage, a

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copy of which is also filed herewith, to secure the payment of said note; and afterward, on the — day of —, 1869, the said plaintiff being about to pay off said note and mortgage, by mistake the interest thereon was computed without deducting the said one year's interest previously paid by the said plaintiff to the defendant on said note; and the said note and mortgage were then delivered up to the plaintiff, and plaintiff paid to said defendant the full amount of said note and mortgage, without deducting or being allowed for said one year's interest so theretofore paid by him to said defendant, all of which was well known to the said defendant; and afterward plaintiff discovered the said mistake, and pointed out to said defendant that part of said mortgage which, in reciting the said note, etc., says, "interest paid to November 30th, 1865;" wherefore, the said defendant then, and afterward, to cause it to be believed that the plaintiff had been, and was, guilty of forgery, and of making use of false pretences to obtain from said defendant the said amount so overpaid to him in satisfaction of said note and mortgage, in speaking of and concerning said note and mortgage, and of and concerning the above recited clause thereof, and of and concerning the said plaintiff, and in order to cause it to be believed that said plaintiff had been, and was, guilty of forgery and of false pretence as aforesaid, in the presence and hearing of divers persons spoke and published the following false and slanderous words, to wit: "You" (meaning the plaintiff) "forged it, inserted it, put it in; you" (meaning the plaintiff) "wrote that clause in it. I" (meaning the defendant) "would swear that that line in the mortgage was not in the mortgage when I gave it to you yesterday, and you put in; you" (meaning the plaintiff) "altered the mortgage, changed the mortgage, put that line in the mortgage, inserted that line, put the credit in; and you are a forger and committed forgery. He" (the plaintiff meaning) "committed forgery; is a forger; is guilty of forgery. There is something here that I don't understand; this line has been put here, or, at least, if I was called on to swear, I would swear that I read the

whole of the mortgage over very carefully, and I did not read that. I let Hotchkiss" (meaning plaintiff) "have the mortgage once, and I never noticed that until after he brought it back. It is his handwriting; I told him so. I suppose he says he is going to sue me for it, but it is my belief; he can't hurt a person for his belief. Hotchkiss" (plaintiff meaning) "is so slippery I have had to watch him; he cheated me out of some money, which he positively agreed to pay, and I am not going to let him cheat me any more. I am positive this" (meaning the said sentence in said mortgage) "was not here when I gave him the mortgage; he put it there; it is his handwriting; I told him so; he can't hurt me for that; he can't hurt a man for his opinion, unless he says he can prove it; I have never said I could prove it. He" (meaning the plaintiff) "must have put that line in the mortgage" (meaning the line relating to said credit); "I am certain it was not there when I gave him the mortgage." Thereby meaning and intending to charge that the plaintiff had committed forgery, and had been guilty of attempting to obtain money by false pretence, and so said words were understood by the hearers.

By which the plaintiff has sustained damages to the amount of ten thousand dollars, for which he brings suit.

The plaintiff, for second paragraph of his complaint, says, that on the 30th day of November, 1864, the plaintiff executed to the defendant the promissory note, a copy of which is filed herewith, and afterward he paid thereon the interest for one year, and afterward, on the 15th day of December, 1865, the parties to said note agreed that if the plaintiff would execute a mortgage to said defendant for the payment of said note, the said defendant would extend the time of payment thereof, and accordingly the said plaintiff, with his wife, signed the mortgage, a copy of which is filed herewith, and there executed the same to the defendant, who approved the same, and expressed himself satisfied therewith, and the plaintiff then took the same to one John Kerr, Esq., a justice of the peace, that plaintiff and his wife might

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acknowledge the same, which they accordingly did, and when the acknowledgement thereof had been certified by said justice of the peace, the said mortgage was delivered by plaintiff to said defendant; and afterward, on the — day of —, 1869, the plaintiff paid off said note and mortgage in full, without deducting the said one year's interest theretofore paid thereon; and the said note and mortgage were then, or afterward, surrendered up to the plaintiff; and afterward the plaintiff discovered the said mistake and demanded the correction thereof from defendant, and pointed out to the said defendant that part of said mortgage which recites the payment of said interest, to wit, "interest paid to November 30th, 1865." The said defendant, in order to cause it to be believed that said plaintiff was guilty of forgery, and of publishing a forged instrument as genuine, and of making use of false pretences to induce the said defendant to accept said mortgage and surrender up the previous mortgage mentioned in said mortgage, a copy of which is filed herewith, and to induce said defendant to extend the time of payment of said note, in speaking of and concerning said note and mortgage, and of and concerning said extension of payment, and of and concerning the said clause in said mortgage above recited, and of and concerning said plaintiff, spoke and published to divers persons the following false and slanderous words, to wit: "If I" (meaning defendant) "was called on to swear, I would swear that I read the whole of the mortgage over very carefully, and I did not read that. I" (meaning the defendant) "let Hotchkiss" (meaning the plaintiff) "have the mortgage once, and I never noticed that until after he brought it back. It is his handwriting; I told him so. I suppose he says that he is going to sue me for it, but it is my belief; he can't hurt a man for his belief. Hotchkiss" (plaintiff meaning) "is so slippery I have had to watch him; he cheated me out of some money once, which he positively agreed to pay, and I am not going to let him cheat me any more. I am positive this" (meaning the sentence above recited) "was not there when I gave him the mortgage; he

put it there; it is his handwriting. He can't hurt me for that; he can't hurt a man for his opinion, unless he says he can prove it; I have never said I could prove it. He altered the mortgage; he inserted that sentence; he defrauded me by changing the mortgage while he had it, and by inducing me to accept it, supposing that it remained as it was when I first saw it, and before he took it away to acknowledge it." By which said slanderous charges, the said defendant meant and intended to charge said plaintiff with forgery, with uttering as genuine a false and forged instrument, and with obtaining the release of said other mortgage, and the extension of the day of payment of said debt by false and fraudulent pretences, and so said words were understood by those who heard them; wherefore plaintiff demands judgment for ten thousand dollars, as in the original complaint.

The only point in the case is as to the sufficiency of the complaint.

By the first paragraph it is alleged that in speaking of the plaintiff, and of and concerning a note and mortgage given to the defendant by the plaintiff, the defendant, after the note and mortgage had been paid off and surrendered up, said the plaintiff had inserted a clause of payment of interest for one year in the mortgage; that plaintiff had forged it; that plaintiff was a forger, and was guilty of forgery.

The second paragraph is similar, except that it fixes the time of the alteration in the mortgage before it was signed and acknowledged by plaintiff, and by him delivered to defendant, and that the plaintiff had been guilty of obtaining money by false pretences, by uttering as true and genuine the said instrument by him so altered and forged. By the innuendo in each paragraph it is alleged that the defendant meant to charge the plaintiff with the crimes of forgery and obtaining money by false pretences.

Section 30, 2 G. & H. 446, defines forgery thus: "Every person who shall falsely make or assist to make, deface, destroy, alter, forge, or counterfeit, or cause to be falsely

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made, defaced, destroyed, altered, forged or counterfeited," then follows a description of the instruments that may be forged, "or any person who shall utter, or publish as true any such instrument, knowing the same to be false, defaced, altered, forged, or counterfeited with intent to defraud any person, body politic or corporate, shall be deemed guilty of forgery."

Are the facts stated in the first paragraph of the complaint sufficient to constitute a good cause of action for slander? The solution of this question depends upon whether the words spoken by the defendant of and concerning the plaintiff, as they are set out in the said paragraph, amounted to a valid charge of a felony against the plaintiff. The innuendo charges that the defendant then and thereby intended to charge the plaintiff with having been guilty of the crimes of forgery and obtaining money by false pretences. We will first inquire whether the crime of forgery was charged, within the meaning of our statute creating and defining that crime, as above quoted. To say of a person that he is a forger, or that he had committed forgery, or that he had forged an instrument that was the subject of forgery, or that he had uttered and published as true any such instrument, knowing the same to be false, defaced, altered, forged, or counterfeited, with intent to defraud any person, body politic or corporate, standing alone without explanation or qualification, is *per se* actionable, for it is charging the person with the crime of forgery, and, if true, it would subject the person charged to the pains and penalties inflicted upon persons guilty of such crime. But where words, in themselves actionable, are spoken of a subject-matter which, in itself, is not a crime, or where there are circumstances given by the speaker, or known to the hearers, which show that no crime had been in fact committed, no action can be maintained for the speaking of the words. *Abrams v. Smith*, 8 Blackf. 95; *Carmichael v. Shiel*, 21 Ind. 66; *Van Rensselaer v. Dole*, 1 Johns. Cas. 239; *Thompson v. Bernard*, 1 Campb. 48; *Dexter v. Taber*, 12 Johns. 239; Townsh. Slander, 142, sec. 144.

It makes no difference what may be stated in the innuendo as to the intent of the defendant, or the language used; the meaning and intent must be determined from the language used, in connection with the extrinsic facts alleged; and if, taken altogether, a felony is not charged thereby, then the words are not *per se* actionable, no matter what the words are. To say of a man, he is a murderer, he killed A. in self-defence, would not import a charge of murder; though the direct charge is made, yet the accompanying explanation shows that such direct charge could neither be intended nor understood to import the crime of murder.

In the case under consideration, the complaint alleges that plaintiff had made a mortgage to defendant to secure the payment of a note; that he had paid off the note and mortgage, and that they had been surrendered up as satisfied; that by mistake the plaintiff had paid one year's interest, which had been paid before the mortgage was given; that the plaintiff had applied to the defendant to refund that interest; that in speaking of the transaction, the defendant had said of the plaintiff that he had inserted that clause in the mortgage after it had been paid off and surrendered up as satisfied, and had thereby committed forgery.

The question is squarely raised, whether a forgery can be committed by changing and altering a note or mortgage that has been paid off and surrendered up as satisfied.

The law is thus stated by Bishop: "And though a promissory note or bill of exchange, after being paid, is *functus officio*, and no note or bill, yet, if this does not appear on its face, a forgery may be committed by altering it. Likewise, it is no defence to a charge of forging bank bills, that the bank never issued bills of the particular denomination forged." 2 Bishop Cr. Law, sec. 508.

The same author, in section 511, says: "Therefore the general doctrine is, that the invalidity of an instrument must appear on its face, if the defendant would avail himself of this defect on a charge of forgery. In still other words, the forged"

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instrument, to be the foundation for an indictment, must appear on its face to be good and valid for the purpose for which it was created."

The case of *Drummond v. Leslie*, 5 Blackf. 453, is very much in point. That was an action for slander. The material facts were these: The plaintiff had been indebted to defendant for rent of a house; that plaintiff had paid the same and taken the receipt of defendant therefor; that the plaintiff had used and uttered the said receipt against the defendant as true and as evidence of such payment; that the defendant had, in speaking of the plaintiff, and of and concerning the said receipt, charged that the receipt had been forged, but he, the defendant, did not say who forged it.

This court say: "The defendant contends that the words are not actionable, and that the judgment should, therefore, have been arrested; but we are of a different opinion. There is not, it is true, a directly affirmative charge that the plaintiff had committed forgery; nor was that necessary. If the words were calculated to induce the hearers to suspect that the plaintiff was guilty of the crime, they were actionable."

The entry made on the mortgage of the payment of interest had the force and effect of a receipt for that much money as paid by plaintiff to the defendant. The plaintiff uttered the same as true and as evidence of such payment. The mortgage, although paid and surrendered up, was a valid instrument as evidence of such payment, and to that extent was capable of being forged.

We are next to inquire whether the facts stated constituted a valid charge of obtaining money by false pretences. That crime is thus defined by our statute: "If any person, with intent to defraud another, shall designedly, by color of any false token or writing, or any false pretence, obtain the signature of any person to any written instrument, or obtain from any person any money, transfer, note, bond or receipt, or thing of value; such person shall, upon conviction thereof, be imprisoned in the state's prison not less than two nor

more than seven years, and fined not exceeding double the value of the property so obtained." 2 G. & H. 445, sec. 27.

To constitute the above crime, it is essential that the person charged should have actually obtained the signature of some person to a written instrument, or obtained money or some thing of value by the means and in the manner described in the above section. The statute does not make the attempt to obtain a signature, or money, or some article of value a crime. The complaint does not allege that the plaintiff obtained any money from the defendant, but all the facts show that he demanded the repayment of the one year's interest, but that the defendant refused to pay the money, and that nothing was received. We are of the opinion that the facts stated in the first paragraph of the complaint constituted a valid charge of forgery, but did not amount to a valid charge of obtaining money by false pretences, and there being one valid charge, the court erred in sustaining the demurrer.

The second paragraph alleges a conversation in respect to the same transaction as that described and set forth in the first, but it differs radically from the first, in this, that it alleges that the alteration was made before the mortgage was signed and acknowledged by the plaintiff and delivered to the defendant.

It was not the mortgage or deed of the plaintiff until he had signed and delivered it, and no alteration he could make on it before signing and delivering it could amount to a forgery. The paper, until signed and delivered, was his own, and under his own control, and he could make any alteration before its execution that he saw proper. The mortgagee was not bound to accept it if it had been altered, but if he did accept of it, it was not a forged and altered instrument, for it was the identical instrument, the same identical mortgage that had been signed and delivered, and in the precise condition that it was when it became a mortgage by the signing and delivery on the part of the mortgagor, and the acceptance by the mortgagee.

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If the mortgage was delivered to the plaintiff, to be by him signed, acknowledged, and delivered to the defendant, and if the plaintiff, before its execution, changed and altered the instrument, without the knowledge and consent of the mortgagee, who accepted of the same without knowing of the alteration, then the plaintiff was guilty of a fraud and a moral wrong, but not of the crime of forgery.

But it is claimed by the appellant that the appellee obtained the acceptance of the second mortgage, and the extension of time on the debt, by false pretences. The point relied on is, that the mortgage was drawn up, read over to, and approved and signed by, the mortgagor, and was then delivered to him to obtain the signature of his wife, and to acknowledge the same before a justice of the peace, and that before it was signed by his wife, and acknowledged by him and his wife, the alteration had been made, and that he had thereby obtained an extension of time, which was something of value to him.

We do not think that this view betters the condition of the appellant. It did not become a mortgage until it was signed, acknowledged, and delivered. The signature of the mortgagor, without its delivery, did not give it the force and effect of an executed instrument. The acknowledgement of the mortgage was not essential to its validity, but its delivery was. To constitute a delivery, there must be an intention to part with the control over the instrument, and place it under the power of the grantee, or some one for his use. See tit. DELIVERY, 1 Abbott's Ind. Dig. 379, where the decisions on this point are collected.

Besides, the extension of time was not obtained by the alteration of the mortgage, for the mortgagee had agreed to extend the time before the alteration was alleged to have been made. Nor did the alteration tend to produce that result, for it is manifest, from the whole case, that the mortgagee would have refused to accept the mortgage if he had known of the alleged alteration.

In our opinion, the court committed no error in sustaining the demurrer to the second paragraph of the complaint.

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But for the error of the court in sustaining the demurrer to the first paragraph of the complaint, the judgment must be reversed. .

The judgment is reversed, with costs, and the cause is remanded, with directions to the court below to overrule the demurrer to the first paragraph of the complaint, and for further proceedings in accordance with this opinion.

DOWNEY, J., having been engaged as counsel, was absent.

A. C. Downey and *S. R. Downey*, for appellant.

C. E. Walker, for appellee.

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87	85
150	145
150	146
150	537

SCHOOL FUND.—*Mortgage.*—*Title.*—*Redemption.*—A purchaser under a sale by virtue of a mortgage to the school fund takes an absolute title, and there is no right of redemption by junior incumbrancers.

APPEAL from the Vanderburg Circuit Court.

DOWNEY, J.—This action was brought by the appellee, as administratrix of the estate of Casper Schellhaus, deceased, against the appellant. Its object was to redeem certain real estate. As the sufficiency of the pleadings is drawn in question by the assignment of errors, it is necessary to a proper understanding of the questions presented and decided to state, in substance, the facts alleged. It is stated in the complaint that on the 14th day of March, 1867, Conrad Litzler and his wife mortgaged certain described real estate to one Seveiking, which mortgage, and the note which it was intended to secure, were assigned to said Casper Schellhaus on the 6th day of April, 1867; that Schellhaus was dead, and the plaintiff had been duly appointed administratrix of his estate; that on the 23d day of December, 1862, said Conrad Litzler and his wife had mortgaged a part of the same

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real estate to the State of Indiana, to secure a loan of school funds; that default was made in the payment of said school fund mortgage; that on the 22d day of March, 1869, the auditor of the county sold the said real estate embraced in the school fund mortgage, and the defendant became the purchaser thereof, and on the 24th day of March, 1869, received a deed therefor from the auditor; that after said sale the plaintiff brought an action to foreclose the mortgage assigned to her intestate as above stated, to which action the defendant was a party; and that on the 23d day of October, 1869, she recovered a judgment against Litzler for the amount of the debt, and the mortgage was declared to be a lien on the tract of land described therein, which was not embraced in the school fund mortgage, and purchased by the defendant, Schnantz; that she caused this property to be sold on execution, and it produced enough to pay only part of her judgment, she becoming the purchaser thereof, the balance due being one thousand one hundred and ninety dollars; that Litzler was, at the date of said judgment, and yet is, wholly insolvent, and the only way in which she can make said balance is by redeeming said land so mortgaged to the school fund and purchased by said Schnantz; that she is ready and willing to pay the defendant the amount paid by him, with interest thereon. She prays for an account of the amount due to the defendant, that she may be permitted to redeem, and for general relief.

There was a demurrer to the complaint on the ground that it did not state facts sufficient, which was overruled, and the defendant excepted.

The defendant then answered, that in the action to foreclose the mortgage, brought by the plaintiff, "for the same cause of action as that set forth in the complaint herein, this defendant recovered judgment duly given upon the merits thereof against the said plaintiff, for the same real estate sought to be subjected herein, and for his costs therein expended, which judgment is still of record in the court, unreversed and in full force. Copies of the complaint, the

answer of this defendant, the reply of said plaintiff, and the said judgment are herewith filed as a part hereof; wherefore," etc. Detached papers, purporting to be copies of the papers referred to in the answer, not certified by the clerk, nor purporting to be a complete record in the cause, are in the record following the answer.

A demurrer to the answer, for the reason that it did not state facts sufficient to constitute a defence, was sustained, and the defendant excepted. The defendant not answering further, the court took the account of the amount due the defendant, and made an order that, on its payment, she should have the right to sell the said real estate so purchased by the defendant, under the school fund mortgage, for the payment of the balance due her, and that any overplus be paid to said Conrad Litzler; that from and after the sale the deed from the auditor to the defendant be set aside, and he be enjoined from setting up any claim under it. The defendant objected to all these rulings, and to each and every part of the judgment rendered.

The errors assigned are, that the court improperly overruled the demurrer to the complaint, improperly sustained the demurrer to the answer, and improperly ordered the surplus, if any, to be paid to the said Conrad Litzler.

Under the first error assigned, that is, the overruling of the demurrer to the complaint, the question is presented as to the effect of the sale of the land by the auditor under the school fund mortgage. The appellant's counsel contend that the effect was to vest in the purchaser the fee simple, and to cut off entirely the equity of redemption of the junior incumbrancer, while the counsel for the appellee contend that its effect was only that of a sale under a foreclosure, to which the junior incumbrancer was not a party, leaving her free to pay the amount due on the prior incumbrance, and to redeem.

The conclusion at which we have arrived on this question will render it unnecessary to examine any other.

The mortgage and note contain a power by which the

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mortgaged premises, in case of default in payment of the principal or interest of the debt, may be forthwith sold, by the county auditor, for the payment of such principal sum, interest, damages, and costs. The statute specially authorizes the auditor to make the sale, and to execute a deed of conveyance to the purchaser. 1 G. & H. 553, secs. 79, 81, 82, and 85. No redemption after sale is provided for.

The note and mortgage constitute but one instrument. They are followed by a certificate of acknowledgment, and duly recorded.

Whoever, then, takes or acquires a subsequent lien on the premises, or interest therein, has full notice of the existence of the power, and the right of the donee thereof to exercise the same on the happening of the contingency.

The notice which the auditor is required to give, before he sells, is a warning to all those who are interested in the estate, whether the mortgagor or junior incumbrancers, that they must redeem before the sale, or be foreclosed. Such powers as this are coupled with an interest, and are irrevocable. The title created by the exercise of such a power is considered as taking effect as if the power and the instrument executing it had been incorporated in one instrument, and as if the purchaser was in by the first grantor, and not by the grantee or donee of the power. As the title takes effect by virtue of the original deed, it follows that a purchaser is not affected by the liens or interests derived from the mortgagor subsequent to the creation of the power, unless protected by statute. Such a sale, upon principle, when not controlled by statute, extinguishes all liens and interests derived from the mortgagor subsequent to the creation of the power. *Bancroft v. Ashhurst*, 2 Grant, Pa. 513.

The judgment is reversed, with costs, and the cause remanded, with instructions to the court to sustain the demurrer to the complaint.

J. M. Shackelford and — *Parrett*, for appellant.

C. Denby and *D. B. Kumler*, for appellee.

HAUSER v. ROTH ET AL.

SPECIFIC PERFORMANCE.—Pleading.—Performance by Plaintiff.—Suit by the widow and heirs of A. to enforce specific performance of a contract between A. and the defendant, for the conveyance by the latter to the former of certain real estate, on condition that A. should pay certain sums to the defendant at certain dates thereafter, and upon the further condition that A. should, at said dates, pay defendant any money that might then be due to the defendant from A., and which might be advanced to A., or on his account, by the defendant, after the making of the contract. The complaint alleged the making of said contract and set it out, and alleged the death of A., and that the plaintiffs were his widow and children, distinguishing which was the widow and which were the children, and alleged full payment and full compliance by A., and that plaintiffs had demanded a deed, which defendant refused to execute.

Held, that the complaint was good on demurrer.

MASTER IN CHANCERY.—Waiver of Jury.—Oral Consent in Open Court.—

Where the defendant was present by attorney at the reference by the court of the cause to a special master in chancery, to inquire and find the facts in the case, and report the same with his conclusions of facts thereon, and complied with an order of the court requiring him to furnish a bill of particulars with the items of account claimed in his answer, and was present also when the report was made and ordered to be spread of record, having entered no objection to the orders at any stage of the proceeding;

Held, that it was too late for him to demand a jury trial, as the record of these facts disclosed such "oral consent in open court," as shown by the entries "on the record," as amounted to a waiver of a jury trial.

Held, also, that the action of the court in overruling a motion for a trial by jury could only be presented for review in the Supreme Court by a bill of exceptions.

BILL OF EXCEPTIONS.—Report of Master.—Exceptions to a report of a master must be presented on appeal by a bill of exceptions.

SAME.—New Trial.—Affidavit.—Affidavits filed in support of a motion for a new trial must be brought up on appeal by a bill of exceptions.

JUDGMENT.—Exceptions.—Waiver.—Although the report of a master does not authorize the judgment rendered, still, if no exception is taken, the error is waived.

APPEAL from the Tippecanoe Circuit Court.

WORDEN, C. J.—This was an action by the appellees, the widow and children of Stephen Roth, deceased, against the appellant, Meinrod Hauser, to enforce the specific performance of a contract for the sale and conveyance of certain real estate, executed by Hauser to Stephen Roth in his lifetime. The contract was in writing, and a copy was set out as a

37	89
125	36
37	89
129	361
37	89
157	95

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part of the complaint. Demurrer to the complaint overruled, and exception taken. Answer filed, and issues formed. Cause referred to a master, who returned a finding of facts for the plaintiffs, on which judgment was rendered.

It is objected that the complaint was insufficient. The contract set out is as follows, viz.: "I have this day agreed to sell and convey to Stephen Roth, by a good warranty deed, the following described pieces or parcels of land in the county of Tippecanoe, and State of Indiana, and described as follows, viz.:" [Here follows the description.] "said tracts, containing in all twenty acres and sixty-two hundredths, more or less; on the express condition that Roth pays to me the sum of two thousand dollars, as follows, viz.: one thousand dollars and interest on the first day of December next, and one thousand dollars and interest on the first day of December, in the year 1862; and upon the further express condition that the said Roth shall, at the times above stated, also pay me the full amount of any moneys which shall then be due and owing from him to me, and which I may advance to him, or on his account, from and after this date.

"In witness whereof, I have hereunto set my hand and seal this 16th day of January, 1861.

"MEINROD HAUSER. [SEAL.]"

The complaint alleges the making of the above contract; that Stephen Roth died on the 7th of October, 1865; that the plaintiffs are his widow and children, stating specifically which is the widow, and which are the children; "that the decedent, in his lifetime, made full payment of said consideration, and did also pay to said defendant all sums of money due him upon any and all accounts whatever, and did fully comply with all stipulations and agreements in said title bond contained; and that the plaintiffs have made demand of the defendant for said warranty deed, which defendant refused to execute."

We think the complaint was clearly good.

There is no bill of exceptions in the record, nor was

any valid exception taken, except that to the overruling of the demurrer to the complaint.

It is claimed that error was committed in not allowing the appellant a trial by jury. The record, in that respect, stands as follows: Demurrers had been filed by the plaintiffs to the answers of the defendant, and the record shows that "on Wednesday, the 63d judicial day of said term, it being the 18th day of December, 1867, come the parties, by their said attorneys, and the court being now sufficiently advised in the premises, do overrule the plaintiffs' demurrer to the defendant's first, second, third, and fourth paragraphs of answer herein; and the plaintiffs except; and the plaintiffs now file their reply to said answer, which said reply reads as follows, to wit:" [Here the reply is set out.] "And thereupon the court do refer this cause to Henry F. Blodgett, Esq., whom the court appoint a special master in chancery, to inquire into and find the facts in this cause, and report the same, with his conclusions of facts thereon, to this court, on Monday, the 30th day of December, 1867; and the court do order that the defendant furnish to said master in chancery a bill of particulars of the items of account claimed in his answer herein; and thereupon the said Henry F. Blodgett now solemnly swears, in open court, that he will honestly, faithfully, and impartially discharge the duties of his trust as such special master in chancery in this cause; and day is given. And afterward, to wit, on the 31st day of December, 1867, come the parties, appearing as heretofore, and comes also the said Henry F. Blodgett, the special master in chancery, to whom this cause was heretofore, at the present term of this court, referred, and, on motion, files his report, accompanied by the evidence by him taken, and day is given.

"And afterward, to wit, on the 2d day of January, 1868, come the plaintiffs, by Behms, their attorneys; and the defendant, by Mattler and Wilson, his attorneys, also comes; and comes Henry F. Blodgett, the special master in chancery, appointed by the court in this behalf; and the court do

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now order that the report and evidence produced and filed in this behalf, in open court, in this court, on the 31st day of December, 1867, by said special master in chancery, be spread of record on the order book of this court; which report and evidence read as follows, to wit:" Then follows the report of the master, with the evidence taken by him.

The report of the master shows that both parties introduced and examined sundry witnesses before him.

Then follows this entry: "And thereupon the defendant, by his counsel, after the filing of said report as aforesaid, moves the court that a jury be called to try said cause, which motion the court overrules, to which ruling of the court the defendant excepts." This is all that is shown by the record in reference to the demand of a trial by jury.

We have a statute providing for the appointment of master commissioners by the judges of the circuit and common pleas courts. 1 G. & H. 433. The last section of the act provides that "such master commissioners shall have the powers and discharge the duties herein mentioned which have heretofore been performed by masters in chancery, so far as the same may be consistent with existing laws." It is quite unnecessary to enter upon a discussion of the powers of a master under this statute, nor need we determine what cases, or for what purposes a cause may be referred to a master. The reference of a cause to a master to inquire into and find the facts in the cause, with directions to report the same to the court, as was done in this case, implies a trial of the cause by the court, and not by a jury. Such reference is a mere mode of enabling the court to arrive at the facts. And the question arises whether what is thus shown by the record amounts to a waiver of the right to a trial by jury. There can be no doubt that the case was one in which the parties were entitled to a jury trial, if not waived, and if properly demanded. The statute provides, that "the trial by jury may be waived by the parties in all actions, in the following manner: first, by failing to appear at the trial; second, by written consent in person, or by attorney, filed with the clerk; third,

by oral consent in open court entered on the record." 2 G. & H. 207, sec. 340.

We are of opinion that the record in this cause discloses such "oral consent in open court" by the entries "on the record." Here it will be seen that the parties were in court at the time the court made the order referring the cause to the master, and requiring the appellant to furnish him with a bill of the particulars of the items of account claimed in his answer. And herein the case differs from that of *Shaw v. Kent*, 11 Ind. 80, as there the record did not show the presence of the parties when the cause was referred.

In the case under consideration, the appellant, by his attorneys, was present when the order was made, and submitted, not only to the order of reference, but to the order requiring him to furnish the master with the specified bill of particulars, making no objection thereto whatever. He must be presumed, therefore, to have consented. If he had required a trial by jury, a mode entirely inconsistent with a reference of the cause to a master, he should then have objected to the reference. "It is held, where a party is in court, that every failure to assert a legal right at the proper time, during the progress of a cause, is a waiver of that right." *Preston v. Sandford's Adm'r*, 21 Ind. 156, and authorities there cited. The appellant did more than merely submit, without objection, to the order of reference; he appeared before the master and offered evidence in support of his defence. He did more than this, for he was present by his attorneys when the report of the master was filed, which he permitted to be done without objection; and finally, he was present when the court ordered the report of the master to be spread upon the order book, together with the evidence, and permitted that to be done without objection.

We hear of no demand for a jury trial until after the report of the master is spread upon the record. We think after all this had been done, it was too late for the appellant to demand a jury trial. It would hardly comport with the due administration of justice to permit the appellant to take

his chances of a favorable report from the master, and then, finding that against him, to elect to take a different mode of trial, viz., a trial by jury. All these steps taken under the reference, to which the appellant consented, because he was present and did not object, involve the consent of the appellant, entered on the record, to waive a jury trial, fully within the spirit of the statute above quoted.

But, in addition to the foregoing view, there is another, which of itself would be decisive of the question. There is no bill of exceptions in the record showing that the appellant demanded, or that the court refused, a trial by jury. All we know about it is the statement of the clerk in the transcript, as above set out. And here again the case differs from that of *Shaw v. Kent, supra*, as in that case such demand and refusal were shown by bill of exceptions.

The motion here does not appear to have been made in writing. No written motion is copied into the transcript, and it is not stated to have been in writing. It must, therefore, be presumed to have been made orally, if made at all.

The code provides, that "where the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exception to writing, and present it to the judge for his allowance and signature," etc. 2 G. & H. 209, sec. 346.

Now, assuming that such motion may be made orally, and that it may be shown, by a bill of exceptions, to have been thus made and overruled, it does not follow that the statement of the clerk, without a bill of exceptions, is sufficient to show the making and character of such oral motion. Moreover, "the grounds of the objection" (to the decision) "do not sufficiently appear in the entry."

The decision objected to is that overruling the motion for a trial by jury. The ground upon which the motion was overruled does not appear, and hence the ground of objection to the decision cannot appear. The motion may have been overruled because, in the opinion of the court, the parties were not entitled to a jury trial, or upon the ground that

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the appellant had waived it, or upon the ground that by some rule of the court the motion should have been in writing, or upon some other ground. Hence, the ground of objection to the decision is not made to appear in the entry, and should have been shown by bill of exceptions.

The record states that the appellant filed exceptions to the report of the master, which were overruled by the court, and the appellant excepted; but in the absence of a bill of exceptions showing these things and the grounds of the ruling, we cannot notice this point. The same may be said in reference to a motion for a new trial, founded, in part, on affidavits that have found their way into the transcript without bill of exceptions. *Blizzard v. Phebus*, 35 Ind. 284.

Finally, the court rendered judgment on the report of the master, and to this no objection was made or exception taken in any form whatever. If the report of the master did not warrant the judgment, still, as no exception was taken, the error was waived. *Train v. Gridley*, 36 Ind. 241.

There is no available error in the record; hence the judgment must be affirmed.

The judgment below is affirmed, with costs.*

W. C. Wilson, R. C. Gregory, and F. J. Mattler, for appellant.

G. O. Behm, A. O. Behm, Z. Baird, C. A. Ray, and J. M. Davidson, for appellees.

*Petition for a rehearing overruled.

THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS RAILROAD
COMPANY *v.* O'CONNOR.

RAILROAD.—*Injury to Animals.—Onus.*—Where a railroad company seeks to shield itself from liability for stock killed where the road is not fenced, on the ground that it should not be fenced at that point, the onus is on the company to establish that fact.

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SAME.—Highway.—Non-User.—Fencing.—Where a highway has not been in a condition for use by the public, and has not been used for thirty-six years, the presumption of its abandonment is justified, and the right to its full use by the owner is restored, and the duty to fence is imposed on a railroad company using a portion of it for its track.

SAME.—County Commissioners.—Cattle at Large.—A railroad company is liable for cattle killed where it has not discharged its duty in fencing, although the county commissioners may not have made any order in regard to cattle running at large in the county.

APPEAL from the Shelby Circuit Court.

DOWNEY, J.—The appellee sued the appellant for the value of a cow owned by him, which he alleged was killed by the cars of the appellant, at a point on the road where it was not securely fenced. The case originated before a justice of the peace, where it was tried, and thence appealed to and tried in the circuit court, each time resulting in a judgment for the appellee. In the circuit court there was a motion for a new trial, which was asked for the reasons that the finding, the cause having been tried by the court, was contrary to law, and not sustained by the evidence; and which was overruled, exception taken, and the evidence set out in a bill of exceptions. The only error assigned is the refusal of the circuit court to grant the new trial.

Counsel for the appellant contend that the company could not fence the road at the point where the cow was killed, because it was located on the Michigan road, a public highway; that they were not required to fence it at that point, for the reason that there was a switch located there for the convenience of a neighboring distillery; and that, as it was not shown that the cow was at large by permission of the board of commissioners of the county, she was therefore a trespasser on the track of the railroad, and the plaintiff should not have recovered.

It is a general rule, made so by statute, that railroad companies are liable for stock killed on their roads without any evidence of wilful misconduct or negligence. 3 Ind. Stat. 415, sec. 5. From this rule are excepted those companies whose roads are securely fenced. *Id.* 416, sec. 7. In the

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construction of these sections the courts have held, in the nature of an additional exception, that the company need not fence the road where it cannot legally be done, as where the railroad runs along a highway, street, or alley, or where it crosses any such highway, street, or alley. This modification of the strict letter of the act was so obviously proper and necessary, that it would, no doubt, have been incorporated into the act, had it occurred to the members of the general assembly.

If the railroad company would shield itself, either in consequence of the road being fenced or because it cannot, at the particular point, legally be fenced, the onus is on the company. Several witnesses testified that the railroad, at the place where the animal was killed, is located on what was the Michigan road; but others testify that it has not, at that point, been used as a highway since 1833; an excavation for a railroad track, at that early day, rendering its use as a highway, from that time, impossible. We do not see how, under this evidence, we can say that the circuit court erred in not finding that the *locus in quo* was a public highway. This period is probably longer than is necessary to show the abandonment by the public and consequent extinction of a highway by non-user.

"Whenever the public easement is relinquished or vacated, the owner of the soil is restored to his original dominion over the same. The land, it is said, reverts to the owner, disencumbered of the public use; but this does not precisely describe the fact. The land does not revert, because there has been no alienation. The public has only been entitled to a certain specific right, the enjoyment of which is incompatible with the exercise of certain private rights, which are, therefore, necessarily suspended. When, however, the public right is relinquished, this incompatibility vanishes, and, as an inevitable consequence, the private rights thereby suspended revive." Angell & D. High., sec. 326. We need not, in this case, decide what precise period of non-user by the public.

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would give rise to the presumption of abandonment. In this case the non-user had been for the term of thirty-six years, at the point in question, which, we think, justified the presumption of such abandonment. *Fox v. Hart*, 11 Ohio, 414; *Amsbey v. Hinds*, 46 Barb. 622.

The second position, as we have already intimated, can only be made good by proof of the facts which excuse the company from fencing the railroad at the point in question. We have carefully read and considered the evidence, and are unable to see that the circuit court committed any error on this point.

The fact that the board of commissioners of the county had made no order as to the running at large of cattle in the county or township is immaterial in this case. The statute expressly makes the company liable, except when the road is fenced, whether the order has been made by the county commissioners or not. 3 Ind. Stat. 415, secs. 5 and 7.

The judgment is affirmed, with five per cent. damages and costs.

E. H. Davis and *C. Wright*, for appellant.

J. B. McFadden, for appellee.

SHIRTS v. IRONS.

WARRANTY.—*Assignment of Account.*—In a mere assignment of a claim or account there is no warranty of its value.

EVIDENCE.—*Hearsay.*—The declarations of a person upon whom an order for the delivery of goods is given are not evidence against the maker of the order.

DEPOSITION.—*When Used.*—When the deposition of a witness, who does not reside in the county of the trial, or in an adjoining county, has been taken by one party, the fact that the other party has had the witness present and has examined him during the trial, does not prevent the reading of the deposition,

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if the witness be not present when it is offered, having been discharged by the party who procured his attendance.

APPEAL from the Hamilton Common Pleas.

BUSKIRK, J.—This is the second time that this case has been in this court. The opinion of the court will be found in 28 Ind. 458, to which we refer for a statement of the case. When this case was here before, the record was very imperfect and defective, but it is now in a much worse condition. A large number of errors have been assigned and argued, but in consequence of the condition of the record only two or three of them can be considered. We are informed by the clerk that a demurrer was filed and overruled to the second paragraph of the reply, but there is no demurrer in the record, and the clerk says there is none in his office. We are also informed by the clerk that a written motion was filed to strike out the second paragraph of the reply, but the motion is not in the record, and the clerk says there is no such paper among the files; and if the motion had been copied into the record it would not have availed the appellant, as the motion and the ruling of the court thereon are not made a part of the record by a bill of exceptions. In this condition of the record, there is no question presented as to the sufficiency of said paragraph of the reply.

The appellant claims that the court erred in excluding certain evidence offered by him, tending to show that the contract set up in the second paragraph of the reply was executed without any consideration, and that the appellant was induced to make such contract by the false and fraudulent representations of the appellee. The third, seventh, and eighth paragraphs of the answer contained matters of payment and set-off. The second paragraph of the reply is directed to all the matters set up and relied upon in said several paragraphs of the answer. It is alleged in the said reply, that the appellant and appellee were partners in a sutler's store, at Nashville, Tennessee, and were connected with the seventieth regiment of Indiana volunteers; that the appellee sold his interest in such business to the appellant and one Pearson, and

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that they agreed in writing, a copy of which was filed, to pay all the debts of the said firm, and that the payments alleged in said several paragraphs of the answer were payments made upon such partnership debts.

The said contract was as follows:

“NASHVILLE, TENN., January 2d, 1863.

“This is to certify that we, William Pearson and Augustus F. Shirts, have, this day, bought of Jonathan Irons, his interest in the sutlery of the seventieth regiment Indiana volunteers; that we agree to pay all debts, yet unpaid, that have been contracted since William Irons sold out to Jonathan Irons.

WILLIAM PEARSON,
AUGUSTUS F. SHIRTS.”

It appears from a bill of exceptions that the appellant offered to prove that the above contract was obtained by the plaintiff for and in consideration of the accounts sold by Irons to Shirts, which were alleged to be insolvent and worthless, to which the plaintiff objected, and the court sustained the objection, on the ground that parol proof was not admissible to explain or vary the terms of said instrument, and excluded the evidence, to which the appellant excepted.

The contract alleges that Irons had sold his interest in the sutlery of the seventieth regiment of Indiana volunteers, and that the purchasers thereof agreed to pay all the debts, yet unpaid, that have been contracted since William Irons sold out to Jonathan Irons.

The appellant offered to prove that the interest referred to in said instrument was the accounts due the said firm, and which were sold by Irons, and that the accounts were worthless and upon insolvent persons. Was the evidence admissible? The evidence offered did not tend to show that the instrument set up in the reply was obtained by fraud. The legal effect of the evidence offered was to prove that the instrument was executed without any consideration. It is provided by section 81, of the code, that “a failure or want of consideration in whole or in part, may be pleaded to any action, set-off, or counter claim upon or arising out of any

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specialty bond or deed, except instruments negotiable by the law merchant, and negotiated before falling due."

The allegation of new matter in the reply is to be deemed controverted as upon a direct denial or avoidance. *Zelnor v. Beard*, 8 Ind. 96.

In *Cunningham v. Banta*, 2 Ind. 604, it was held, that where the instrument did not purport to set out the consideration in full, nor the manner of payment, that parol evidence was admissible to show what the consideration was, and how it was to be paid, and that such evidence did not contradict the deed.

In *Orth v. Sharkey*, 4 Ind. 642, it was held that it was competent to prove by parol the consideration of the note, but incompetent to prove a verbal contemporaneous agreement varying the terms of the note.

In *Rockhill v. Spraggs*, 9 Ind. 30, this court held that where the consideration mentioned in a deed was a valuable one, it might be shown by parol to have been a good consideration. The opinion in this case contains a very full review of the authorities in this country and in England upon the point under consideration.

The ruling in *Rockhill v. Spraggs*, *supra*, was followed in *Jones v. Jones*, 12 Ind. 389.

It was held by this court, in *Collier v. Makan*, 21 Ind. 110, that "though parol evidence cannot be admitted to vary the effect of a written instrument, it is admissible to show that a written instrument was made without consideration."

It was held by this court, in *The City of Aurora v. Cobb*, 21 Ind. 492, that "where an instrument is executed as a contract, between private parties, acknowledging the receipt of the consideration, whether it be money or specific articles, or a promise or undertaking to be executed by one party, it may be shown, in bar of a suit on such instrument, that the consideration was not received; and no recitals in such instrument will estop the party interested to plead the want or failure of consideration."

The instrument made a part of the reply is not very full

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and satisfactory. It recites that Irons had that day sold his interest in the sutlery of the seventieth regiment of Indiana volunteers to Shirts and Pearson, and that they agreed to pay all debts yet unpaid that had been contracted since William Irons sold out to Jonathan Irons. The instrument does not show what the interest of Irons was, nor in what it consisted. It may have been the stock in trade; it may have been the horses and wagons employed in the business; it may have been the accounts due him for goods sold, or it may have been all of these things. It would not have varied or contradicted the written instrument to have admitted parol evidence to show what was the real consideration of the promise to pay the debts of the said Jonathan Irons, contracted subsequent to his purchase from William Irons.

It is quite clear to us that the exclusion of the evidence offered cannot be sustained on the ground that it varied or contradicted the written instrument, but if it was incompetent or inadmissible for any other reason than that stated in the bill of exceptions, the ruling of the court would not be erroneous. Courts may rule correctly, and yet give bad reasons for such rulings. We can only look to the legal effect of the decision, without reference to the reasons assigned, or which operated on the mind of the court. The true inquiry is, did the ruling affect, injuriously, the legal rights of the party complaining thereof. If it did, the case should be reversed, otherwise not.

The object of the evidence offered and excluded was, to prove that the promise of the appellant to pay all the debts that had been contracted by Jonathan Irons subsequent to his purchase from William Irons, and which remained unpaid, was the sale by Jonathan Irons to the appellant and Pearson of the accounts due to Irons for goods sold, and that said accounts were "insolvent and worthless."

Was such evidence admissible for any purpose? The solution of that question depends upon whether a person who sells an account warrants the genuineness of the ac-

count, and the solvency of the person on whom said account is.

Section 6 of the code, 2 G. & H. 38, provides that, "when any action is brought by the assignee of a claim, arising out of contract, and not assigned by indorsement in writing, the assignor shall be made a defendant, to answer as to the assignment, or his interest in the subject of the action."

In the case under consideration, there was no indorsement in writing on the accounts. There was a simple sale of the accounts, and a delivery, which only amounted to an equitable assignment. No action could have been maintained on them by the assignee, without the assignor was made a defendant. *Swails v. Coverdill*, 17 Ind. 337.

Section 4 of an act of March 11th, 1861, concerning the assignment of promissory notes and other instruments in writing signed by any person, provides as follows:

"Sec. 4. Any such assignee, having used due diligence in the premises, shall have his action against his immediate or any remote indorser, and in a suit against a remote indorser, he shall have any defence which he might have had in a suit brought by his immediate assignee." 2. G. & H. 658.

It has been repeatedly decided by this court that the right of the assignee to maintain an action against an assignor "has its foundation in express and positive legislation." A large number of the cases are collected in note 5, 2 G & H. 658.

It was held by this court, in *Reid v. Ross*, 15 Ind. 265, that the assignor of a judgment did not warrant the solvency of the judgment debtor. The court say: "But, though this be the case, we are unable to perceive on what ground the assignor is to be held to warrant the solvency of the judgment debtor, as in the case of the assignment of a promissory note. The statute authorizing the assignment contemplates no such warranty as being involved in a simple assignment. The assignment simply transfers the judgment to the assignee, and no liability as to the solvency of the judgment debtor attaches, in the absence of fraud or express stipulation. We see no good reason why this transfer does not

stand upon the same ground as the transfer of any personal chattel.

“On the other hand, the statute authorizing the transfer of promissory notes, etc., expressly provides not only that the assignee may sue the maker thereon in his own name, but, also, that having used due diligence in the premises, he shall have his action against his immediate or any remote indorser.”

In the absence of fraud or express stipulation, there is no warranty of solvency in the sale of accounts. The common law gives no right of action to the assignee of a note against the assignor, for we have seen that right is conferred by statute. The act of March 11th, 1861, authorizing the assignment of promissory notes, etc., does not embrace accounts, for they are not “signed by any person” within the meaning of that statute.

Section 6 of the code, authorizing the “assignee of a claim arising out of contract, and not assigned by an indorsement in writing,” does not give to the assignee any action against the assignor.

The appellant did not offer to prove that there had been any false and fraudulent representations or express warranty as to the solvency of the claims. This proposition was to prove that the consideration for the agreement to pay the outstanding debts was the sale of the accounts, and that they were insolvent and worthless.

If the testimony had been admitted, it would not have availed him, for it would have been the duty of the court to have told the jury that it did not prove a warranty of the solvency of the claims, or create any liability against the assignor.

We are of the opinion that the court committed no error in excluding the evidence.

It is also claimed that the court erred in excluding the declarations of Payne, James & Co. The question arises in this manner. When Irons sold his sutlery to the appellant, he sold him certain goods that were in the warehouse of Payne, James & Co., and gave the appellant an order on said

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house for such goods. The appellant testified that he presented the order, and that said firm refused to deliver the goods. It was then offered to prove that the reason the said firm gave for not delivering the goods was, that they held a lien on them for about four hundred dollars. To the admission of this evidence the appellee objected, and the objection was sustained by the court, and the appellant excepted, and assigns this ruling for error.

We are of the opinion that the court committed no error in excluding the evidence. It was competent for the appellant to testify whether he did or did not receive the goods on the order, but it was incompetent for him to state the reasons assigned by the firm of Payne, James & Co. for refusing to deliver them. They were third parties, and their declarations would have been hearsay. It does not appear that the appellee was present, and he could not be bound by the declarations of third parties.

It is next assigned for error, that the court erred in excluding from the jury certain questions and answers in the deposition of William W. Irons. It appears of record that the appellant took the deposition of the said Irons, who resided in Hendricks county, in this State; that the appellee produced in court the said Irons, who was examined in chief, cross examined, and re-examined; that the appellee had discharged the said witness, who had returned home and was not present at court, when the appellant offered to read certain portions of his deposition as rebutting evidence. The court excluded the evidence. Was such exclusion proper?

It is claimed by the appellee that the ruling was correct, for the reason that William W. Irons, having been present in court during the trial, his deposition could not be read. Section 252 of the code, 2 G. & H. 176, reads as follows:

"Sec. 252. No deposition shall be read in evidence on the trial of a cause, if at that time the witness himself is produced in court, unless the deposition has been taken by agreement of the parties, or by the order of the court."

It is claimed by the appellee that the proper construction

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of the above section is, that if the witness is produced in court at any time during the progress of the trial, his deposition cannot be read in evidence; while, on the other hand, it is maintained that the deposition can be read if the witness is not in court when the deposition is offered in evidence.

In a case like the present, we are inclined to adopt the construction contended for by the appellant. The trial was had in Hamilton county. The witness resided in Hendricks county. We take judicial notice of the fact that Hendricks county does not adjoin Hamilton county. The appellant could not have compelled the attendance of the witness by subpoena and tender of fees. His only means of procuring his testimony was by taking his deposition. This mode he adopted. The appellee, being the brother of the witness, produced him in court as his witness; and after he had been examined, he was discharged by the appellee without the knowledge or consent of the appellant. The appellant had no control over the witness. The appellee, having induced his personal attendance, had the right to discharge him. The appellant could not have compelled the witness to remain in attendance at the court, by having him subpoenaed and fees tendered, in Hamilton county. See secs. 232 and 233, p. 167, and sec. 250, p. 175, 2 G. & H.

We think the court erred in excluding the deposition, as the witness was not present at court when the same was offered in evidence. The rule would be otherwise where the party could enforce the attendance of the witness.

It is also insisted by the appellant that the court erred in overruling the demurrer to the second paragraph of the reply. It is claimed that it was a departure. We do not think so. The ruling of the court was correct.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, and for further proceedings, in accordance with this opinion.

A. F. Shirts, for appellant.

L. M. Campbell, for appellee.

Lee v. Pile.

LEE v. PILE.

PROMISSORY NOTE.—*Consideration Paid by Indorsee.*—In an action on a promissory note brought by an indorsee against his indorser, the complaint alleging the insolvency of the maker and the non-payment of the note, it is not necessary to state the amount paid for the purchase of the note, as, *prima facie*, the face of the note fixes the sum to be recovered.

SAME.—*Indorsement Without Liability.—Mistake.*—In such an action, an answer that the note was exchanged with the plaintiff for certain property delivered to the defendant, and that he delivered the note to the plaintiff, and then, at his request, and solely for the purpose of parting with any apparent title thereto, he indorsed the same, is no defence to the action, as it does not allege that the plaintiff agreed to take the note without indorsement. The additional averments, that it was expressly agreed that the plaintiff should accept the note under the contract, for the property delivered to the defendant, and should rely on the maker for payment, who was the owner of large property; and that the defendant, being ignorant of the law governing his liability, indorsed the note simply to transfer his ownership, and that it was no part of the agreement that he should be liable as an assignor thereof, and that the words “without recourse” were, by mistake, omitted in making said indorsement, are not sufficient to render the paragraph good, as they contradict the written contract of indorsement.

APPEAL from the Shelby Circuit Court.

DOWNEY, J.—Suit by Pile, the indorsee of a promissory note, against Lee, the indorser. It is alleged that Fisher, the maker, was, when the note matured, insolvent and a non-resident of the State. There was a demurrer to the complaint, which was overruled, and the defendant excepted. The defendant then answered, among other paragraphs, as follows:

“Par. 2. And for further answer to the plaintiff’s complaint, the defendant says that heretofore, to wit, on the — day of April, 1870, the plaintiff and the defendant and said Fisher resided in Marietta, Shelby county, Indiana, and were well acquainted with the pecuniary standing of each other; that the defendant was then and there the owner and holder of said note and also another note; and the plaintiff was the owner of six head of mules; and Fisher was the owner of ten thousand dollars worth of property, personal and real; that it was then and there agreed by and between the plaintiff and defendant, that the defendant would and should de-

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liver to the said plaintiff said notes and pay him sixty-two dollars and fifty cents for and in exchange for said mules, to be then and there delivered by the plaintiff to the defendant; that in pursuance of said agreement the said plaintiff then and there delivered to the defendant said mules; that long afterward to wit, on the 25th day of May, 1870, the said defendant delivered the said notes to the plaintiff without indorsement; that then and there the said plaintiff asked the defendant to indorse his name on the back of said notes, for the sole purpose of divesting himself of all apparent interest in said notes, and to evidence that the defendant had transferred said notes to the plaintiff, and that the plaintiff was the rightful holder thereof; that upon said request, and without any consideration whatever, the defendant indorsed his name on the backs of said notes, and delivered them to the plaintiff, and paid him said sum of sixty-two dollars and fifty cents; and that he did then and there, to divest himself of all interest in said notes, and for no other consideration, indorse his name on said notes."

"Par. 4. And for further answer, the defendant says that he admits the indorsement of the note in the complaint mentioned, as therein set forth, but says that the plaintiff should not recover, because he says that at the time of said assignment of said note, by the defendant to the plaintiff, the plaintiff was the owner of six mules, which he then and there sold to the defendant for said note, and another note, and sixty-two dollars and fifty cents; that Fisher was then and there a resident of Shelby county, and possessed of a large amount of valuable personal and real property, and well known to the plaintiff and defendant; and as a part of said agreement of exchange, it was expressly agreed that said plaintiff should take and accept said notes on said agreement of exchange and rely on said Fisher for their payment; that it was no part of said agreement that said defendant should be responsible as an assignor thereof; and that at the request of the plaintiff and without consideration, and, as the plaintiff said, to show that the defendant had transferred to him the said notes, being

wholly ignorant of the law governing his liability as such assignor, he then and there wrote his name across the back of each of said notes, and by mistake he omitted to indorse said note 'without recourse,' as by their said agreement the same should have been done."

The plaintiff then demurred to these paragraphs of the answer. His demurrer was sustained, and the defendant again excepted.

There was a reply by way of traverse to the other paragraphs, a trial by the court, and a finding and judgment for the plaintiff. The defendant appeals, and here assigns as error, first, the overruling of the demurrer to the complaint; second, sustaining the demurrer to the second paragraph of answer; third, the sustaining the demurrer to the fourth paragraph of the answer; fourth, the refusal of the court to grant him a new trial.

We think the complaint is sufficient. The objection to it, urged in the brief of counsel for the appellant, is, that the consideration paid by the plaintiff for the assignment of the note is not stated. It is urged that because the consideration paid, with interest, is the measure of the defendant's liability, therefore it must be alleged. We do not think so. The amount of the note is, *prima facie*, the amount which the plaintiff is entitled to recover. If the defendant would insist upon any other amount as that which the plaintiff should recover, it is for him to show the facts which require or justify its adoption. *Youse v. M'Creary*, 2 Blackf. 243.

The assignment of a note is itself a contract, which imports a consideration, and that consideration, *prima facie*, is the amount of the note. *Folnston v. Dickson*, 1 Blackf. 256, and n.; *Hamilton v. Pearson*, 1 Ind. 540.

The next question relates to the sufficiency of the second and fourth paragraphs of the answer. These paragraphs are so nearly alike that they need not be considered separately. The fact stated in each of them, that Fisher was the owner of ten thousand dollars' worth of property, does not, in our judgment, tend to show that the contract was

that the notes should be taken without recourse. That fact might show that the plaintiff would probably have consented to take the notes at his own risk; but at the same time it equally tends to show that the defendant would probably have been willing to indorse the notes of one who was, apparently, so well able to pay.

We do not understand the second paragraph of the answer as alleging that there was an agreement between the parties that the notes were to be delivered by the defendant to the plaintiff without indorsement, or indorsed without recourse; nor do we think the circumstances alleged are sufficient to imply any such agreement. If this paragraph was intended as an answer setting up a failure or want of consideration, it is insufficient, because it shows that there was a consideration. The mules which had been sold and previously delivered by the plaintiff to the defendant were the consideration.

In the fourth paragraph it is alleged that it was "expressly agreed that said plaintiff should take and accept said notes on said agreement of exchange, and rely on said Fisher for their payment." It is not stated here that the plaintiff was to rely exclusively on Fisher for the payment of the notes. If he took the notes indorsed, he must rely on Fisher primarily, and on the defendant only conditionally. But it is also alleged that "it was no part of said agreement that said defendant should be responsible as an assignor." And, on the other hand, we think it is true that there is no agreement shown that the defendant should not be responsible. In the absence of any agreement, one way or the other, the indorsement must be held to have been made in pursuance of the contract. But if there was an agreement, by parol, that the plaintiff should take the notes at his own risk, or under an indorsement that there should be no recourse, and this was part of the contract made at the time the notes were indorsed and delivered, its existence could neither be legally alleged nor proved, for the reason that it would be in contradiction of the legal effect of the indorsement. *Wilson v. Black*, 6

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Blackf. 509, and cases cited; *Blair v. Williams*, 7 Blackf. 132; *Campbell v. Robbins*, 29 Ind. 271. In the second paragraph, the parol agreement is alleged to have been made at the time when the note was indorsed, and that paragraph is clearly bad under this rule.

The allegation of the ignorance of the defendant of the legal effect of the indorsement cannot avail him anything; for *ignorantia juris, quod quisque tenetur scire, neminem excusat*.

There was no motion for a new trial, and therefore the assignment that the court erred in refusing to grant a new trial is wholly out of place.

The judgment is affirmed, with five per cent. damages and costs.

B. F. Davis and *B. F. Love*, for appellant.

O. F. Glessner, for appellee.

COGHILL v. THE STATE.

CRIMINAL LAW.—*Obstructing Railroad Track*.—Section sixty-six of the “act defining misdemeanors and prescribing punishment therefor,” 2 G. & H. 475, does not repeal section twenty-nine of the “act defining felonies and prescribing punishment therefor,” 2 G. & H. 446.

APPEAL from the Fountain Circuit Court.

BUSKIRK, J.—The appellant was indicted, tried, convicted, and sentenced to the state prison, for the term of two years, for obstructing a railroad track. The court overruled motions for a new trial and in arrest of judgment, and the appellant excepted. The evidence is not in the record, and, consequently, we shall presume that the verdict was sustained by the evidence. The motion in arrest of judgment raises the question of whether the indictment was sufficient.

The appellant presents for our consideration and decision but one question, and that is, whether the section of the

37	111
139	248
37	111
155	272
37	111
170	491

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statute upon which this indictment was based has been repealed. The indictment was founded upon section 29 of the "act defining felonies and prescribing punishmenttherefor," approved June 10th, 1852, which reads as follows:

"Sec. 29. If any person shall wilfully and maliciously place any obstructions upon the track of any railroad, or change any switch, or remove the fastenings thereof, so as to endanger the passage of trains, or break, destroy, steal, take or carry away any lock or guard upon such switch, or wilfully commit any other act to throw the engine or cars running upon such railroad from such track, he shall be imprisoned in the state prison not less than one, nor more than seven years; and if, from any accident on any such road, resulting from any such act, any person be so injured that death ensue as the immediate consequence thereof; the person so offending shall be deemed guilty of murder in the second degree, and upon conviction shall be imprisoned in the state prison during life." 2 G. & H. 446.

It is maintained, with great earnestness and ability, that the above section was repealed, by implication, by section 66 of "the act defining misdemeanors and prescribing punishment therefor," approved June 14th, 1852, which reads as follows:

"Sec. 66. Every person who shall, in any manner, obstruct any public highway, railroad, towpath, canal, turnpike, plank or coal road, or injure any toll or other bridge, or toll-gate, culvert, embankment, or lock, or make any breach in any canal, or injure any material used in the construction of such roads and canal, such person, and all other persons aiding and abetting therein, shall be fined not exceeding five hundred dollars, or imprisoned not exceeding three months; and upon prosecution for obstructing a highway, it shall be sufficient to prove that it is used and worked as such." 2 G. & H. 475.

The only error assigned and relied on in argument is, that section 29 of the felony act was repealed by section 66 of the misdemeanor act. Is the position well taken? Sedgwick,

in his valuable work on Statutory and Constitutional Law, p. 127, states the law as follows: "So in this country, on the same principle, it has been said that laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject; and it is, therefore, but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable; and hence a repeal by implication is not favored; on the contrary, courts are bound to uphold the prior law, if the two acts may well subsist together."

It was held by this court, in *Blain v. Bailey*, 25 Ind. 165, that "it is a maxim in the construction of statutes, that the law does not favor a repeal by implication, and it has accordingly been held that where two acts are seemingly repugnant, they must, if possible, be so construed that the latter may not operate as a repeal of the former." *Bowen v. Lease*, 5 Hill, N. Y. 221; *Bruce v. Schuyler*, 4 Gilm. Ill. 221; Dwar. Stat. 674. It has also been held, in pursuance of this maxim, that an act is not repealed by implication where the legislature had no intention to repeal it. *Tyson v. Postlethwaite*, 13 Ill. 727."

It was held by the Supreme Court of the United States, in the case of *Norris v. Crocker*, 13 How. U. S. 429, that, "as a general rule it is not open to controversy, that where a new statute covers the whole subject-matter of an old one, adds offences, and prescribes different penalties for those enumerated in the old law, then the former statute is repealed by implication; as the provisions of both cannot stand together. To ascertain whether there be a repugnance, the two enactments must be compared."

The principles enumerated in the above authorities meet with our entire approval. To constitute a repeal by implication, the new statute must cover the whole subject-matter of

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the old one, and prescribe different penalties. Let us compare the two enactments.

Under the first statute, it is essential that the act should be done wilfully and maliciously. Malice is an essential ingredient of the crime. The following definition of malice was given by the learned judge who presided at the trial of John W. Webster for the murder of Dr. George Parkman: "Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill will toward one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And, therefore, malice is implied from any deliberate or cruel act against another, however sudden." *Commonwealth v. Webster*, 5 Cush. 295.

By the latter statute, the offence is complete without malice. By the first statute, the offence consists in placing an obstruction upon the track of the railroad, or changing a switch so as to endanger the passage of trains. By the last statute, the offence does not necessarily consist in placing the obstruction upon the track, and not at all with the intention of endangering the passage of trains. The *gravamen* of the crime, under the first statute, consists in wilfully committing any act to throw the engine or cars running upon a railroad from the track. This wicked intent is not necessary to create the offence under the latter act. There is a wide and marked difference between the two enactments in another respect. In the first section, it is provided that if death results as the immediate consequence of any accident caused by such obstruction, the person placing such obstruction upon the track shall be deemed guilty of murder in the second degree, and upon conviction shall be imprisoned in the state prison during life.

The new act contains no such provision. The last act

does not cover the entire subject-matter of the first. The two may subsist together, and both may be executed; the first, when the act is done wilfully, maliciously, and with the intent and for the purpose declared therein. The second may be enforced when the act is done without malice, and without the intent necessary to constitute the crime under the first act, but is done mischievously, carelessly, or negligently. These sections can subsist together, and be enforced in the same manner that section 12 of the felony act, and section 3 of the misdemeanor act subsist together, and are enforced. There is just the same difference between the crimes declared by such sections as exists between those under examination. The one is called malicious mayhem, and the other simple mayhem. To constitute the one, the act must be done "on purpose and of malice aforethought." When thus done, the act constitutes a felony, and the punishment is confinement in the state prison for not less than two nor more than fourteen years. To constitute the other, the act must be done "violently and unlawfully," and the punishment is a fine and imprisonment in the county jail, not exceeding six months, and not less than twenty days. The degree of criminality and punishment is made to depend upon the presence or absence of malice and a wicked intent. So with the enactments under consideration.

It was said by this court, in *Blain v. Bailey, supra*, that "an act is not repealed, by implication, when the legislature had no intention to repeal it." The repeal of laws is made in two ways; the one by a direct and express repeal; the other, by the passage of a new act which covers the entire subject-matter of the old one, and presents different punishment, and creates such an irreconcilable repugnancy between the acts that both cannot subsist together. The section upon which the indictment under consideration was based was especially and solely intended for the protection of railroads and the preservation of the lives of persons who travel thereon. The main purpose of the other was the protection of highways and canals. The protection of railroads did not con-

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stitute the principal purpose. Section 66 of the misdemeanor act, with the exception of the word railroad, will be found, in substance, in all our criminal codes from the organization of our state government, while section 29 was enacted after the introduction of railroads in our State. The new condition of things created the necessity for a new law.

We are unwilling to believe that the legislature ever intended to provide that a fine, not exceeding five hundred dollars, and imprisonment not exceeding three months in the county jail, was an adequate punishment for wilfully and maliciously placing an obstruction upon the track of a railroad for the purpose of endangering the passage of trains. Men do not usually commit crime without a motive, and we can ordinarily understand the motives that prompt men in the commission of crimes. We can comprehend the motive of the man who slays another who had cruelly wronged him or those who were near and dear to him, or of the man who, actuated by avarice, commits larceny, forgery, or robbery, or imbrues his hands in the blood of his fellow-man, or of the man who, carried away by his lust, outrages an innocent and unprotected woman. We can readily comprehend the motives that prompt to the commission of the above and many other crimes that have disgraced and dishonored the human family in all ages and in all countries. But we are unable to comprehend any sufficient and adequate motive that could induce any human being, who was created in the image of God, and endowed with any of the feelings of humanity, to commit so cruel, remorseless, and horrible an act as to place an obstruction upon the track of a railroad, whereby hundreds of men, women, and children, who had never wronged him, and against whom he has no personal malice, might be killed. Such a person could not hope to profit by his crime, as the wrecker upon the sea shore, who by false lights decoys a vessel to destruction, and then robs the crew and passengers. A malicious and revengeful man, who believed that he had been wronged by the officers of a railroad, might be tempted to destroy the property of the

company, or endanger the lives of those he believed had injured him; but a man must be a demon in human shape, who, for the sake of revenging himself upon those he hates, could break the limbs, mangle the bodies, and destroy the lives of entire strangers, who had never, by thought, word, or act, wronged him, his family, or property. A person capable of committing so horrible and revolting a crime must be the enemy of all mankind. The existence of such fiends in a Christian and civilized country strongly tends to support the doctrine of "original sin and total depravity."

It is laid down by Sedgwick, that "laws are presumed to be passed with deliberation, and with full knowledge of existing laws," and, we add, with full knowledge of the character and purpose of existing laws.

Attributing to the wise men who enacted the two statutes under consideration full knowledge as to the existence, character, and purpose of section 29 of the felony act, our minds cannot be brought to the conclusion that they intended to repeal such section by the passage of section 66 of the misdemeanor act.

We are clearly of the opinion that the last act does not cover the entire subject-matter of the former act, and that there is no irreconcilable repugnancy between the two acts. They can stand together. Both can be executed. There is nothing in this case to induce us to relax the strict rules of construction. The appellant cannot justly say that justice has been administered to him without mercy.

The judgment is affirmed, with costs.

J. McCabe, for appellant.

R. B. F. Pierce and *B. W. Hanna*, Attorney General, for the State.

Forgey *et al.* v. The Northern Gravel Road Company *et al.*

FORGEY ET AL. v. THE NORTHERN GRAVEL ROAD CO. ET AL.

TURNPIKE.—*Failure to Assess all Lands Liable.*—A complaint for an injunction to restrain the collection of assessments on land within one and one-half miles of a certain turnpike road, for benefits conferred by the construction of the same, alleged that there were more than twenty thousand acres of land thus liable, and that only thirteen thousand acres had been returned on the list by the assessors.

Held, that the complaint was good on demurrer for want of sufficient facts.

APPEAL from the Tippecanoe Circuit Court.

DOWNEY, J.—The complaint in this case was filed by the appellants to enjoin the collection of certain assessments of benefits in favor of the said gravel road company, on the lands within one and one-half miles of the road of said company, under the act of 1867. Among other objections to the assessment, it is alleged that within the prescribed distance from the road, there are over twenty thousand acres of land, and that the list returned by the assessors contains less than thirteen thousand acres; thus showing that one-third or more of the land within the prescribed distance is omitted in making the list. A demurrer to the complaint was sustained. It should have been overruled. *Hardwick v. The Danville & North Salem Gravel Road Co.*, 33 Ind. 321; *The New Haven & Fort Wayne Turnpike Co. v. Bird*, 33 Ind. 325.

The judgment is reversed, with costs, and the cause remanded.

S. A. Huff and *B. W. Langdon*, for appellants.

M. Jones, *J. L. Miller*, *S. T. Stallard*, and *W. C. Wilson*, for appellees.

Fishburn v. Jones.

FISHBURN v. JONES.

INDEMNIFYING BOND.—*Fraudulent Representation.*—*Guarantee.*—In an action upon a bond given with surety by one partner to another to indemnify the latter against the partnership liabilities, false and fraudulent representations as to the amount of these liabilities, made to the surety for the purpose of inducing him to execute the bond, by the partner to whom the bond was given, it was *held*, would constitute a good defence to the action against such surety. Such representations, without an averment of fraud, will not be sufficient in pleading. Nor will an answer that the party receiving the bond guaranteed that the firm liabilities should not exceed a certain sum be sufficient, no guarantee being contained in the bond.

APPEAL from the Lake Common Pleas.

PETTIT, J.—The appellant sued Jones, the appellee, and one Childs, on a bond given by Childs as principal, and Jones as surety, to appellant, to indemnify him against certain liabilities contracted by appellant and said Childs, under the firm name of Childs & Fishburn. The penalty of the bond is fifteen hundred dollars, and conditioned that Childs shall well and faithfully pay off and discharge, and otherwise save the appellant harmless from all liabilities on account of said firm's indebtedness; and pay off and hold appellant safe and harmless as the surety of Childs on a note given to Stevens & Son. The breaches assigned are the payment by the plaintiff of a large amount of the firm indebtedness, and the note given to Stevens & Son. Jones answered in three paragraphs. The first admits the execution of the bond, and affirms that he signed it as surety for the defendant, Childs; that the appellant fraudulently and designedly, and with intent to procure the appellee to sign said bond as Childs' surety, misrepresented the amount of liabilities of the firm of Childs & Fishburn, in this: that said firm, at the date of the signing of said bond, had on hand three hundred dollars; that the firm liabilities, including the note to A. Stevens & Son, did not exceed five hundred dollars; that the firm would immediately apply the three hundred dollars on hand to the payment of the debts; that the residue of said indebtedness could and

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would be easily paid in the regular business to be carried on by said Childs as successor of the firm of Childs & Fishburn; that appellee, relying on the representations and believing them to be true, signed the bond; that the same were false, etc., in this: that said firm did have on hand three hundred dollars, and did apply it in payment of the debts; and Childs did apply all moneys he could raise out of the business to the payment of the indebtedness, yet they were insufficient to discharge the same by one thousand dollars; that said firm indebtedness did exceed five hundred dollars, by at least five hundred dollars, "all of which the plaintiff well knew."

The second paragraph of the answer is exactly the same as the first paragraph, except that it leaves out and omits any charge of fraud as stated in the first paragraph, and instead thereof asserts that Fishburn, the appellant, at and before the time of executing the bond by Jones, guaranteed that the firm indebtedness of the firm of Childs & Fishburn did not exceed six hundred dollars; that the appellee relied on the guarantee, and believing it to be true, signed the bond. The paragraph then concludes like the first, except it does not charge fraud.

The third answer sets up the same facts as the first and second, with the exception that it simply avers that Fishburn "represented and stated" said facts to be true; that Jones relied on them and signed the bond, whereas in truth and in fact they were untrue. This answer omits all allegations of fraud as charged in the first paragraph and of guarantee as charged in the second.

To these several answers the plaintiff, Fishburn, filed separate demurrers, assigning for cause that the answers did not state facts sufficient to constitute a defence.

The demurrers were overruled by the court, and this ruling excepted to by the appellant.

The overruling of the demurrers to the answer is assigned for error.

The first paragraph, directly charging fraud and fraudulent intent, with all of the facts and circumstances attending the

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execution of the bond by Jones, is so palpably good that we shall cite no authorities, but will only remind counsel and parties "that fraud renders void all contracts."

The second and third paragraphs of the answer are, in our opinion, clearly bad, and the demurrer ought to have been sustained to them. The second paragraph says that plaintiff guaranteed, etc. This is not in the bond, and cannot be injected into it to vary its conditions by answer or verbal evidence. The principle or rule is, that when parties, after whatever conversation or preparation, at last reduce their contract to writing, this must be looked on as the final consummation of their negotiation, and the exact expression of their purpose. And all earlier agreements, which are not incorporated into the written contract, must be considered as intentionally rejected. 2 Pars. Con. 548; Willard Eq. 75.

The third paragraph charges neither fraud nor guarantee, but simply that appellant represented and stated, that the debts of the firm would not exceed five hundred dollars. We do not decide that false representations, though honestly and innocently made, may not operate as a fraud and vitiate a contract made on or under them; but we do decide that in such a case the answer must contain a charge of fraud, or it will be bad.

The demurrers to the second and third paragraphs of the answer should have been sustained, and because they were not, the judgment must be reversed.

There are a number of errors assigned in reference to the action of the court after disposing of the demurrers to the answer, which we are not fully agreed upon, and as the issues have to be re-made, we think it unimportant to decide them.

The judgment is reversed, at the costs of the appellee, and remanded for further proceedings.*

A. L. Jones, W. H. Calkins, and A. D. Bartholomew, for appellant.

S. I. Anthony and T. J. Merrifield, for appellee.

*Petition for a rehearing overruled.

 Shoemaker, Auditor of State, *et al.* v. Smith *et al.*

WINTERROWD ET AL. v. MESSICK.

JUDGE.—*Special Appointment.*—*Appeal.*—Although the record shows that three different judges successively sat, during the making of the issues and trial of a cause, without any evidence in the record of their appointment, the question as to their qualification cannot be raised for the first time on appeal.

APPEAL from the Shelby Common Pleas.

DOWNEY, J.—There is no question in this case, except that the record shows that three different judges sat, successively, during the making of the issues and trial of the cause, without any evidence in the record of their appointment.

No objection was made, or question reserved, in the court below with reference to the appointment or qualifications of the gentlemen who held the court.

Under the later rulings of this court, the question cannot be presented now for the first time. *Feaster v. Woodfill*, 23 Ind. 493; *Hyatt v. Hyatt*, 33 Ind. 309; *Watts v. The State*, 33 Ind. 237.

The judgment is affirmed, with five per cent. damages and costs.

B. F. Love, B. F. Davis, and M. M. Ray, for appellants.

E. H. Davis and C. Wright, for appellee.



SHOEMAKER, AUDITOR OF STATE, ET AL. v. SMITH ET AL.

SINKING FUND.—*Constitution.*—*Construction.*—The word “invest,” as used in section 4 of article 8 of the constitution, in order to harmonize with section 6 of the same article, must be construed as broad enough to cover loans made by the counties, and that the fund may be intrusted to them for that purpose; and yet, while covering the loan of money, it does not restrict to that mode of investment.

SAME.—*Statute.*—*Constitutionality.*—The amendatory act of February 24th, 1871, in regard to the sinking fund, is not in conflict with section 4 of article 8 of the constitution.

SAME.—*Recital.*—*Certainty.*—The act of 1871 is sufficiently certain in its reci-

37	122
120	530

37	122
120	444

37b	122
141	659
142	257
142	362

37b	122
145	459

37b	122
148	348
148	349
152	16

37b	122
153	544

37	122
161	232
161	233

37	122
Case 2	
169	238

37	122
171	666

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tal of the act amended; and the date of the approval of that act is not necessary to be stated in the act amending it; and the court will take judicial notice that there is no other act with the title which is recited.

SAME.—Title.—The title of the amendatory act adds nothing to the title of the original act, and the title of the original act is valid, because it has a single subject sufficiently indicated or expressed; and it embraces the amendments as though they had been, at first, a part of the original act.

SAME.—Mistake.—Intention.—The use of the terms, "board of commissioners of the sinking fund," and "board of sinking fund commissioners," in the act, does not vitiate the statute, as it is plain what party was intended.

SAME.—Sixth Section.—Fourth Section.—The original sixth section of the act amended, and the entire amendment of 1871, are valid, with the exception of the fourth section of the amendment, on which no conclusion was reached, as it was not involved in the decision.

APPEAL from the Marion Circuit Court.

WORDEN, C. J.—This was an action by the appellees against the appellants to restrain the latter from distributing to the several counties of the State the school funds in the hands of the auditor, amounting, as is alleged, to four hundred thousand dollars or more, in accordance with the provisions of an act of the legislature, approved February 24th, 1871 (Acts 1871, p. 6), amendatory of an act on the subject of those funds, approved March 11th, 1867. Acts 1867, p. 21.

Judgment for the plaintiffs below.

There was no question made in the court below, nor is there in this court, except those arising upon the controverted validity of the act of 1871, above cited. A number of objections to the act in question have been urged, which will be considered in such order as is convenient and seems to be appropriate. The questions thus arising are not entirely free from difficulty, and we have given them the attention and consideration which their importance and magnitude demand. We desire to say here that we have been greatly aided, in the consideration of the questions presented, by the able and exhaustive arguments, both oral and written, of the learned counsel for the respective parties.

In order to an understanding of the questions presented, it will be proper to set out the title of the act of 1867, and

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the sixth section of that act, and also the act of 1871, with its title. They are, respectively, as follows:

“An act to provide for the custody and management of the notes, bonds and mortgages arising directly out of loans heretofore made by the board of sinking fund commissioners; to continue in force all laws or parts of laws in force on the 20th day of January, 1867, which are applicable to said loans and the securities therefor; to clothe the auditor of state with the powers, and subject him to the duties in relation to said loans and securities therefor, which by said laws are vested in, or imposed upon said board of sinking fund commissioners; to provide for the incidental expenses of the management of said loans and securities, including clerk hire, and for the mode and periods of the payment of such allowance for expenses; substituting the seal of the auditor of state for that of the board of sinking fund commissioners, and declaring an emergency for the immediate taking effect of this act, and providing for auditor of state to execute bond and payment of all moneys into the state treasury. Approved March 11th, 1867.

“Section. 6. All moneys received by the auditor under this act, or under any of the acts hereby continued in force, or belonging to said sinking fund, shall, whenever the sum amounts to four thousand dollars or more, forthwith notify the secretary and treasurer of state of the amount of said fund in his hands, and the said auditor, secretary and treasurer, shall immediately proceed to invest the funds then in the hands of said auditor, or under his control, in the five or two and one-half per cent. stocks of the State, by purchasing the same on the best and lowest terms that they can be had for in the market; and the said auditor shall keep an accurate list of the names of the persons from whom purchased, the time and place of purchase, and the price paid therefor; and he shall report to the governor at least once in three months, and to the general assembly at each session, a full account of all his transactions in relation to such purchases; any stocks or bonds thus purchased shall be imme-

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diately cancelled by writing across the face 'purchased for the school fund,' dated and signed by the auditor, secretary and treasurer of state; and a non-negotiable bond shall be issued in favor of said school fund, as now provided by law."

"An act to amend the sixth section of an act to provide for the custody and management of the notes, bonds, and mortgages arising directly out of loans heretofore made by the board of sinking fund commissioners, to continue in force all laws, or parts of laws, in force on the 20th day of January, 1867, which are applicable to said loans and the securities therefor; to clothe the auditor of state with powers, and subject him to the duties in relation to said loans and securities therefor, which by said laws are vested in or imposed upon said board of sinking fund commissioners; to provide for the incidental expenses of the management of said loans and securities, including clerk hire, and for the modes and payment of such allowance for expenses, substituting the seal of the auditor of state for that of the board of sinking fund commissioners, and declaring an emergency for the immediate taking effect of this act, and providing for the auditor of state to execute bond and payment of all moneys into the state treasury, and adding supplementary sections thereto. Approved February 24th, 1871.

"Section 1. Be it enacted by the general assembly of the State of Indiana, that section six of the foregoing entitled act be amended so as to read as follows:

"All moneys received by the auditor under this act, or under any of the acts hereby continued in force, or belonging to said sinking fund, shall, whenever the same amounts to four thousand dollars or more, forthwith notify the secretary and treasurer of state, of the amount of said fund in his hands; and the said auditor, secretary, and treasurer shall immediately proceed to distribute among the different counties of the State, in proportion to the number of inhabitants in such county according to the late census; and in making such distribution among the several counties, the said board of sinking fund commissioners shall notify the

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county auditor of such county or counties as may be entitled to such distributive shares or parts, from time to time, of the amounts so ready for distribution; and thereupon the said county auditor shall draw his warrant in favor of his respective county treasurer, on the board of commissioners of the sinking fund, for such sum or sums as he may have been notified is ready for distribution for such county; such treasurer shall present the same to the board of commissioners of the sinking fund, who shall pay the same to such county treasurer.

“Sec. 2. As fast as the said sinking fund shall come into the different counties of this State, as provided by this act, the same shall be loaned out. The county auditor and county treasurer of their respective counties shall proceed to loan out and invest, in said funds so held in trust for common school education, by loaning the same upon real estate security, in the same manner and subject to the same conditions as the other common school funds are now loaned by law: *Provided*, that the amount of interest arising from the loans made under this act shall be disbursed by the county auditor and treasurer without diminution.

“Sec. 3. All loans hereafter made by said auditor and treasurer shall be at the rate of eight (8) per cent. per annum.

“Sec. 4. Any officer who shall receive any bonus or interest for deposit of any part of this fund, shall, upon conviction thereof, be deemed guilty of a felony, and shall forfeit his office.

“Sec. 5. It is hereby declared that an emergency exists for the taking effect of this act; therefore, the same shall take effect and be in force from and after its passage.”

It is claimed by the appellees that the distribution of the fund to the several counties of the State, as contemplated by the act of 1871, is in violation of the fourth section of the eighth article of the constitution of the State; and hence that the law providing for such distribution is void. The fourth section must be taken in connection with the sixth

section of the same article, as they both bear upon the subject. They are as follows:

"Sec. 4. The general assembly shall invest, in some safe and profitable manner, all such portions of the common school fund as have not heretofore been intrusted to the several counties; and shall make provision by law for the distribution, among the several counties, of the interest thereof.

"Sec. 6. The several counties shall be held liable for the preservation of so much of the said fund as may be intrusted to them, and for the payment of the annual interest thereon."

The argument of the appellees, on this point, may be stated briefly, thus: As the constitution requires the general assembly to "invest" the fund in some safe and profitable manner, it cannot be distributed to the counties and put out at interest, as is contemplated by the law in question; that the term "invest," as used in the constitution, requires a disposition of the fund different from a mere loan of it upon interest; such as the purchase of bonds, stocks, etc.

We have come to the conclusion that the word "invest" was not used in the restricted sense thus claimed, but in a sense broad enough to embrace the idea of a loan at interest. It will be borne in mind that at the time of the adoption of the constitution, a large amount of the common school fund had been intrusted to the several counties, and had been loaned out, and was drawing annual interest, which went to the support of common schools. With this state of facts in the minds of the framers of the constitution, the two sections of that instrument, above quoted, were adopted. In arriving at the proper construction of that instrument, we must consider all its parts; and it may be observed that the latter part of section four, which makes it the duty, of the general assembly to make provision, by law, for the distribution among the several counties of the interest on the fund, implies that it shall be so invested as to produce interest.

The object of the section was to make the fund secure, and also make it return or yield interest to be distributed to

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the several counties. This object might be accomplished, either by lending the money at interest on safe and ample security, or by the purchase of interest-bearing bonds or securities, that were safe, and in all respects secure. If the fourth section, standing alone, would be doubtful, still, the sixth section being construed with it, the meaning of both is reasonably clear.

By the sixth section, the right of the legislature to intrust the fund to the several counties, to be put at interest, is expressly recognized. The several counties are to be held liable for the preservation of so much of the fund as may be intrusted to them, and for the payment of the annual interest thereon. The language employed cannot have reference to the fund that had already been intrusted to the counties, because it speaks for the future and not for the past. It contemplates a future intrusting of the fund, or some part of it, to the several counties. The words "may be" are peculiarly appropriate to express the future and not the past. *Indianapolis, etc., Railroad Co. v. Kercheval*, 16 Ind. 84. That the language employed had reference to the future and not to the past, is also shown by the debates in the convention. In the debates of the convention (vol. 2 p. 1880), it is shown that when the article in regard to education was under consideration in the convention, a motion was made to recommit, with instructions to strike out the following: "The several counties of this State shall be held liable for the preservation of so much of said funds as may be entrusted to them, and the payment of the annual interest thereon." This, it will be seen, was section six, above quoted, before some very slight verbal alterations were made. On the motion to recommit, etc., Mr. Bryant, who was a member of the committee on education, said: "I am opposed, therefore, to any provisions which shall say to those having charge of this fund, this is your own fund, waste, squander, or destroy it, as you may, you shall be held to no accountability therefor. Another reason why I favor this section is, that at the expiration of the charter of the state bank, a very large portion of this

fund, heretofore employed in the bank, will be seeking other investment. It may become necessary to deposit it with the counties. Are you prepared to say that they shall not be responsible for its safe keeping? The section applies to moneys which may hereafter be entrusted to them; it is not necessary so far as the funds heretofore placed in their hands are concerned. The law has already fixed and determined their responsibility for them, and even if you strike out this section, their liability for past losses will not be changed nor affected."

Now, as in section six, the right of the general assembly to intrust the fund to the several counties is clearly recognized, and as the counties are to be held liable for the preservation thereof, and also for the payment of the annual interest thereon, it cannot be conceived that the convention used the term "invest," in section four, in a sense that would make it utterly inconsistent with the right thus recognized in section six. We therefore think that the word "invest," as used in the fourth section, in order to harmonize with the sixth, must be construed as broad enough to cover loans made by the counties, and that the fund may be intrusted to them for that purpose. In other words, the term "invest" is used in a sense broad enough to cover the loaning of the money, but does not restrict to that mode of investment. This is a little beyond the ordinary meaning of the word, but the context absolutely requires the construction we have given it; otherwise the sixth section, above quoted, would remain a dead letter, without force or significance.

Webster defines the word "invest" as follows: "To lay out money in the purchase of some species of property, usually of a permanent nature; literally, to clothe money in something; as, to invest money in funded or bank stock; to invest it in lands or goods." In this application it is always followed by "in." But we know that in common parlance the word is sometimes used in the sense which we ascribe to it in this instance; thus we sometimes hear it said that a man's money

is invested on bond and mortgage, or note and mortgage, meaning that it is lent on those securities.

The British parliament, within a short time after the adoption of the constitution, viz., in 1859, used the word "invest" in the sense of to lend; the sense covered by the word in the case before us. In an act of 22 and 23 Vict., ch. 35, sec. 32, we find the following provision: "When a trustee, executor, or administrator shall not, by some instruments creating his trust, be expressly forbidden to invest any trust fund on real securities, in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on the East India stock, it shall be lawful for such trustee, executor, or administrator to invest such trust fund on such securities or stock; and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper." No argument is necessary to show that the word was not used in this act in the restricted sense which would limit the investment to a purchase, but in the broader sense which would permit loans upon the securities named.

The view we take of this question is strengthened by, because it is in harmony with, the contemporaneous construction of the constitution by other departments of the government. The fund in question arose from sections 113 and 114 of the act of January 28th, 1834, establishing a state bank. This fund is, by the constitution, made a part of the common school fund. Up to 1859 it continued to be loaned out by the board of sinking fund commissioners established by the bank act, in accordance with that act. On January 15th, 1859, an act of the legislature was passed, providing for the election, by that body, of a new board of sinking fund commissioners, and providing that they should have all the powers and discharge all the duties theretofore appertaining to the sinking fund board, and be governed by the laws which then were, or which might thereafter be, enacted in reference thereto. 1 G. & H. 572. Here is a very clear recognition of the right, under the constitution, to invest the fund by way of loan. Soon after

this, viz., on the 1st of March, in the same year, another act was passed providing for a distribution of the fund to the several counties to be loaned out. 1 G. & H. 574.

There are, probably, other instances of similar legislation, but the above are sufficient for our purpose, which is to show the contemporaneous legislative construction of the constitution. From the time of the adoption of the constitution down to January, 1859, the legislature permitted the fund to be loaned as it had theretofore been, and then passed an act virtually providing for future loans; and soon after an act for the distribution of the fund to the several counties to be loaned. While contemporaneous construction by the legislative department is by no means conclusive, it is not without weight, and is entitled to respect.

From the foregoing considerations, we hold that the act of 1871 is not in conflict with the fourth section of the eighth article of the constitution.

We proceed to the other questions involved in the case. And first, it is objected that the amending act of 1871 leaves it uncertain what law was intended to be amended. This objection is made on the ground that the date of the approval of the act amended is not stated, either in the title to, or the body of, the amending act; and upon the ground of the slight verbal discrepancies which exist between the title of the act amended and the recital thereof in the title of the amendatory act. The discrepancies alluded to, it will be seen by comparison, are so slight as to be of no importance whatever. The very slight verbal inaccuracies occurring in the transcription could not mislead any one, and they do not, as we think, render it at all doubtful or uncertain what law was intended to be amended. There was no need of stating the date of the approval of the amended law. This is usually, but not necessarily done, and the omission can be of no consequence if the law intended to be amended is pointed out with such reasonable certainty as to identify it. This is done by a substantial recital of its title, and we will take judicial

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notice that there is no other statute bearing such title. This objection is not well taken.

Again, it is insisted that the title of the amended act is not sufficient to embrace the subject-matter of the amendments.

The title of the amendatory act adds nothing to the title to the original act, so that the question is presented whether the title to the original act is sufficient to embrace the amendments, had they been at first a part of the original act.

The constitution requires that "every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title."

The question presented is not free from doubt and difficulty. But an act of the legislature should not be held void as unconstitutional, unless it be clearly so. Where the constitutionality of a statute is merely doubtful, it is the duty of the courts to sustain it. *Stocking v. The State*, 7 Ind. 326. *Maize v. The State*, 4 Ind. 342.

In looking at the title of the act of 1867, we find a variety of enumerated particulars, all bearing upon one general subject, viz., the management of the sinking fund. The whole subject could have been much more briefly, if not better, expressed, by the title, "An act providing for the management of the sinking fund."

If the different particulars enumerated are to be regarded as so many different subjects, then the law is wholly void because of a multiplicity of subjects. If, on the other hand, the enumerated particulars do not embrace different subjects, but have reference to one general subject, which is not sufficiently expressed in the title, the law is still void. If, however, the enumerated particulars are not expressive of different subjects, but of one general subject, which is sufficiently indicated or expressed, the law is valid. One of three conclusions must follow; either, first, that the act is void, as embracing too many subjects; or, second, that it is void because no subject is expressed in the title; or, third, that it is valid, because it has a single subject sufficiently expressed in the title. The latter is the conclusion which we, with

some doubt and hesitation, draw from the premises. The particulars enumerated we regard as expressive, not of so many different subjects, but of one general subject, the management of the sinking fund. The mode adopted of expressing this subject is circuitous, verbose, and prolix; but taking the entire title together, we think the subject named above is sufficiently expressed. There can be no exact standard of certainty erected, by which to test the sufficiency of the expression of the subject. We quote, as in point, and as expressing views in which we fully concur, the following passage from the opinion of the court in the case of *Bright v. McCullough*, 27 Ind. 223: "The constitution does not assume to divide the general scope of legislation, and classify the parts under particular heads or subjects, but, of necessity, has left that power to be exercised by the legislature, as it, in its wisdom and discretion, shall deem proper. The constitution assumes that different subjects of legislation do exist, and requires that each act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. The purposes of the provision, in view of the evils intended to be guarded against, can only be effected by requiring that the subject expressed should be reasonably specific, or, in other words, should be such as to indicate some particular branch of legislation, as a head under which the particular provisions of the act might reasonably be looked for."

Some liberality must be allowed in the construction of the language employed to express the title; otherwise many valuable and beneficial acts of legislation, which have stood unquestioned for years, must fall to the ground, and the constitutional provision which was intended to remedy an evil will itself become a source of unmitigated evil.

We conclude, that under the title to the act in question, any member of the legislature might reasonably have looked for any legislation on the subject of the management of the sinking fund, and that the title is virtually as broad as if it

had been "an act to provide for the management of the sinking fund."

But we are met with the argument, that inasmuch as the title enumerates certain particulars in reference to the sinking fund, although the management of that fund was the subject, yet the legislation must be limited to the particulars enumerated; and the case of *The State v. Bowers*, 14 Ind. 195, is cited upon the point.

We recognize the authority of that case and the correctness of the decision; but we think a distinction may be drawn between that case and the present. In that case the title of the amended act was, "An act concerning licenses to vend foreign merchandise, to exhibit any caravan, menagerie, circus, rope and wire dancing, puppet show, and legerdemain." The amendment, without enlarging the title, sought to require a license for exhibiting a concert for pay. It was held, that though the subject of the act was licenses, yet that subject was limited to the particulars enumerated in the title of the act sought to be amended, and that the amendatory act was void for the want of a sufficient title. There, it will be seen, the subject of the act, licenses, was, in the title, expressly limited to the particulars enumerated. No member of the legislature, or other person, upon reading that title, would conceive that in the body of the act a license might be required for any other purpose or purposes than those enumerated.

How is it in the case before us? The first clause of the title is as follows: "An act to provide for the custody and management of the notes, bonds, and mortgages arising directly out of loans heretofore made by the board of sinking fund commissioners." Would not a person, upon hearing this clause read, infer that the "custody and management" might relate, as well to the moneys when due and paid, as to the notes, bonds, and mortgages by which the moneys were secured? What special management did the notes, bonds, and mortgages, merely as such, require?

There is another clause in the title that may be noticed,

viz., that "to provide for the incidental expenses of the management of said loans and securities," etc. The management of the loans and securities being mentioned in the title, it might well be inferred that the management of the fund was provided for in the body of the act. Indeed, the words "loans and securities" seem to be put to represent the fund. The language of the title, instead of excluding the idea that the management of the fund was provided for in the body of the act, is open to the inference, to say the least of it, that such provision was made.

It follows, from these considerations, that the original sixth section of the act of 1867 was valid, and also the entire amendment of 1871, as the scope and effect of both the original and the amendment were to provide for the management of the fund. We except from this conclusion the fourth section of the amendment, on which we express no opinion, as no question in the cause arises upon it.

Finally, it is claimed that the amendment is so uncertain and incongruous in its terms as to be incapable of execution, and, therefore, void. The amendment of the sixth section illustrates the remark of Chancellor KENT, that "such is the imperfection of human language, and the want of technical skill in the makers of the law, that statutes often give occasion to the most perplexing and distressing doubts and discussions, arising from the ambiguity that attends them." 1 Kent Com. 461.

The first branch of the section, by its literal terms and grammatical construction, requires the moneys, whenever four thousand dollars or more shall have been received by the auditor, to give notice of the fact to the secretary and treasurer of state.

Again, the board of commissioners of the sinking fund is mentioned three several times in the same amended section, although that board ceased to exist on the 20th of January, 1867, by virtue of an act passed December 21st, 1865. 3 Ind. Stat. 502, sec. 7. But, says the author before quoted, the

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“real intention, when accurately ascertained will always prevail over the literal sense of terms.”

In the terse language of Judge STUART, in the case of *Spencer v. The State*, 5 Ind. 41, “in statutory exposition, the reason, the spirit, the intention of the law, is above the mere cavil about words. The chief thing to be explored is the intention. This the judiciary is to seek in the history of legislation, in the objects contemplated, the evils to be corrected, and the remedies provided.”

The evident intent of the first clause of the section was to require the auditor, whenever the specified amount of moneys was received by him, to give the notice specified. This, in our minds, admits of no doubt. By a slight change only in the structure of the sentence, this intent may be more clearly expressed; thus, “whenever moneys amounting to four thousand dollars or more are received by the auditor under this act, or under any of the acts hereby continued in force, or belonging to said sinking fund, he shall forthwith notify the secretary and treasurer of state of the amount of said fund in his hands.” By this reconstruction of the sentence the intent is more clearly expressed, but is scarcely rendered more apparent.

Then, the inappropriate use of the term “board of sinking fund commissioners” does not render the intent and meaning of the legislature, in any considerable degree, doubtful.

By the act abolishing that board, above referred to, it was required, after the 20th of January, 1867, “to surrender to the auditor of state all the books and papers, stocks, bonds, mortgages, moneys, rights, credits and effects belonging to said fund.” By the first section of the act of 1867, the act thus amended, the auditor was invested with the powers, and subjected to the duties, touching the loans and securities, that had pertained to the board of sinking fund commissioners.

Thus it will be seen that the auditor had not only the legal custody of the fund, but also stood, in relation to the fund, in the shoes occupied by the late board.

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Now, in each instance in which the term "board of commissioners of the sinking fund," or "board of sinking fund commissioners," is used in the amendment, it is intended to designate the officer, person, or body having the legal custody and control of the fund. This is apparent on the face of the statute, and no argument could make it plainer. The auditor of state was that officer. We can hardly conceive by what obliviousness such a mistake, in the designation of the officer intended, could have been made. But the mistake does not vitiate the statute. Where it is clear, as in this case, what party was intended, a mistake in his description or designation does not defeat the intention.

The maxim, "*Falsa demonstratio non nocet*," aptly applies. There are many cases scattered through the books that illustrate and sustain the principle above applied, but we will not consume time, nor extend this opinion, by collecting them here. The legal effect of the statute is the same, in our opinion, as if the auditor of state had been designated in the several instances where the mistaken term was used.

We have thus considered the several questions in the cause, and have not been able to see any valid objection to the law; and we are of opinion that the court below erred in holding it void.

The judgment below is reversed, with costs, and the cause remanded, with directions to the court below to dismiss the cause.

B. W. Hanna, Attorney General, *D. W. Voorhees*, *S. Claypool*, *W. R. Harrison*, *J. W. Nichols*, and *L. Jordan*, for appellants.

J. L. Mitchell, *W. A. Ketcham*, *J. E. McDonald*, *J. M. Butler*, and *E. M. McDonald*, for appellees.

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ROGERS v. ABBOTT ET AL.

MISTAKE.—*Misdescription of Land.*—Where land has been sold, and the purchaser put into possession, and the purchase-money paid, but an erroneous description of the land has been carried through the bond for a deed into the deed itself, and perpetuated through subdivisions of the land, and resales, in all cases possession being given and the purchase-money paid, equity will grant relief and correct the misdescription upon proper proof. But when, during the transfers, a judicial sale intervenes, and the error is carried into the judgment, the advertisement, the appraisement, the sale, and the sheriff's deed, equity cannot give relief by ordering a correction of the description of a subdivision, at the suit of the purchaser at the sheriff's sale, or those claiming under him.

APPEAL from the Jefferson Circuit Court.

DOWNEY, J.—The facts alleged in the complaint in this case are as follows: That Comley, being the owner in fee simple of certain real estate, described in the complaint, and in the possession thereof, sold the same to Benjamin Abbott, and put him in possession thereof, giving him a title bond, and Abbott paid for the land; that by some mistake, the land was described in the bond as the south-west quarter of the south-east quarter, instead of the south-west quarter of the north-east quarter, of section thirty-four, township four, range eleven east; that this mistake was carried into the deed from Comley to Abbott; that said Abbott, before he had received his deed from Comley, sold ten acres of the land to one Danner, and gave him a title bond therefor, and put him in possession, and Danner fully paid Abbott for said ten acres. In describing the ten acres in the title bond to Danner, the same mistake was made as to the forty acre tract embracing the ten acres, as in the title bond and deed from Comley to Abbott. Danner, after having paid for the ten acres, assigned his title bond to one James Brown, and put him in possession; that after Comley had conveyed said land to Abbott, he, at the request of said James Brown, conveyed said ten acres to Mary Brown, the wife of said James Brown, by the same erroneous description; that at the time

of this conveyance, James Brown was in possession of the ten acres, but had not fully paid for the same, and had the deed therefor made to his wife to defraud his creditors; that Danner recovered a judgment against said James Brown for the balance of the purchase-money, and then, in connection with plaintiff, instituted a suit to subject the ten acres of land to the payment of Danner's judgment and the plaintiff's claim, and a judgment was rendered, setting aside the deed to Mrs. Brown, as fraudulent, and ordering the sale of the ten acres, but by the same erroneous description as in the bonds and deeds above mentioned; that Danner assigned his interest in the judgment to the plaintiff, who caused an execution to issue on the same, and said ten acres of land to be sold by the sheriff, and the same was purchased by and conveyed by the sheriff to Charles E. Walker, in trust for the plaintiff, and that said Walker afterward conveyed the same to the said plaintiff, who immediately entered into possession of the same, and continued in possession of the same until the 1st day of May, 1870, by his tenant, and afterward by a party to whom he contracted to sell the same; that the title bonds referred to were, at the date of making the deeds, surrendered up and destroyed; that while the plaintiff was so in possession of said ten acres of land, and claiming to own the same in fee simple, on the 28th day of May, 1866, said Abbott discovered said mistake, and to cheat and defraud the plaintiff out of said ten acres of land, without any consideration, induced said Comley to convey the said forty acres of land, intended to have been conveyed by him to said Abbott, to his son, Joseph Abbott, who resided near the land, and knew that the plaintiff had possession thereof; that said Benjamin Abbott, by quitclaim deed, also, conveyed said forty acres of land, by its correct description, to said Joseph Abbott, while plaintiff was in possession thereof, and claiming to be the owner of said ten acres, part thereof; that said Joseph Abbott has secretly put the defendant Richardson in possession of said ten acres of land, and he still holds possession thereof. Prayer, that the title of plaintiff to the

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ten acres be quieted, and that the defendants be enjoined from setting up claim thereto, and that he recover the possession thereof and one hundred dollars damages, and for other proper relief.

The defendants, Joseph Abbott and Richardson, the death of Benjamin Abbott having been suggested by the plaintiff, demurred to the complaint on the grounds of defect of parties defendants, and because the facts stated are not sufficient to constitute a cause of action. This demurrer, as to the first ground, was overruled, and as to the second, it was sustained, and the question reserved. This action of the court presents the question, and the only question for our consideration. It is quite evident that the facts alleged plead very strongly for the interposition of judicial authority in the correction of the mistake in the description of the land. Possession of the land intended, in every instance, was given to the party purchasing, and a full consideration was paid. The difficulty arises out of the facts that the judgment directing the sale of the ten acres of land, and the advertisement, appraisement, if any was made, and the sale and conveyance thereof by the sheriff each designated and described another piece or tract of land than that intended, and of which possession was taken. Such mistakes in the description of real estate between private persons, in bonds, mortgages, deeds, etc., are freely corrected by the courts. But when the sale is judicial, difficulties arise which at once cause a court to hesitate, seek for reasons, and search for precedents. The learned counsel for the appellant, who not only knows the law, but, what is almost equally important, knows where to find it, has not referred us to any authority for the position assumed by him.

If the mistake was in the deed only, perhaps it might be corrected in this way. *Johns v. DeRome*, 5 Blackf. 421. But if we should correct the deed, and attempt to vest in the plaintiff the title to the tract of land which he claims, we should give him land which was not ordered by the court to be sold, nor advertised by the sheriff, nor sold by him,

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nor purchased by the plaintiff. The difficulty seems to us insurmountable, especially as to a correction of the description in the notice of sale given by the sheriff. A material misdescription of the land to be sold by the sheriff and a sale according to such misdescription render his sale invalid. Crocker Sheriffs, sec. 512. In *Mahan v. Reeve*, 6 Blackf. 215, a bill in chancery was filed to correct a mistake in describing the lands, in the notice, petition, and order of court for sale, in a proceeding in partition, which had resulted in a sale of the land by order of the court. The proceeding had been sustained in the inferior court. This court disposed of the case, on error, by remarking, "We think this decree is erroneous. No authority is cited, and we know of none, that shows a court of chancery to have jurisdiction in a case like that described in the bill." See *Davis v. Cox*, 6 Ind. 481. If the plaintiff has any remedy, and we do not say that he has not, it must be by means of a proceeding different from this.

The judgment is affirmed, with costs.

C. E. Walker, for appellant.

J. R. Cravens, for appellees.

 WILSON ET AL. v. DAVIS ET AL.

DECEDENTS' ESTATES.—*Creditor*.—A creditor of a decedent's estate must proceed to enforce his claim against the estate through an executor or administrator, and cannot sue the heirs, devisees, and legatees, where there has been no administration.

SAME.—*Executor de Son Tort*.—*Liability*.—If any one has, without an administration, though he be a legatee under a will, taken possession of any of the property of a decedent, he may be sued as an executor *de son tort*, by an unpaid creditor.

APPEAL from the Harrison Common Pleas.

DOWNEY, J.—Appellants sued the appellees. Demurrers

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filed by part of the defendants to the complaint were sustained. The plaintiffs declining to amend the complaint, judgment was rendered for the defendants. The only question presented here is the question as to the correctness of this ruling. In the first paragraph of the complaint it is alleged that on the 8th day of May, 1856, James Davis died intestate, seized in fee simple of certain real estate, which is described in the complaint, and the equitable owner, by title bond, of certain other real estate, the legal title to which was afterward conveyed to the heirs of said deceased by a commissioner's deed; that the said deceased left a widow, Abigail Davis, and the plaintiffs, Mary J. Wilson, Sarah Askren, Elizabeth Potts, Catharine Davis, and Margaret Bates, and the defendants, Thomas E. Davis, James N. Davis, and Hester Davis, his heirs. John, another son of said deceased, died, and his share of the land descended to his mother and brothers and sisters. It is further alleged that no letters of administration of the estate of said James Davis, deceased, were ever issued to any one, but that said Abigail, the widow, on the 25th day of May, 1856, took possession of the whole of said real estate, and had the possession and use of it, and received the rents, issues, and profits thereof, from that time until the 25th day of May, 1868; that the yearly value thereof was one hundred and fifty dollars, making in all sixteen hundred and fifty dollars, for which she never accounted; that on the 17th day of November, 1868, she died, leaving a will, by which she devised all her real estate, and bequeathed all of her personal estate to the defendant Thomas E. Davis, subject to the payment of five hundred dollars to said Hester Davis, and the delivery to her of certain articles of personal property; that no letters testamentary or of administration were ever granted to any one of her estate; that she died seized of certain real estate described in the complaint, of which said defendant, Thomas E. Davis, took possession, on the 25th day of November, 1868, and has ever since occupied, used, and enjoyed the same; that she also died the owner and in possession of personal property of the value of fifteen hundred dollars, a list

of which is filed with the complaint; that said defendant, Thomas E. Davis, without administration, also took possession of said personal property, and has converted the same to his own use; that said Thomas E. Davis refuses, though often requested, to pay to said plaintiffs the amount due them.

In the second paragraph it is alleged that said James Davis, deceased, left two thousand dollars' worth of personal property, which was converted by said Abigail to her own use, and that she never accounted therefor; that she made her will and died as alleged in the first paragraph; that she was the owner of real estate, which is described, of the value of twenty-five hundred dollars, and personal property of the value of fifteen hundred dollars; that defendant Thomas E. Davis, without administration, took possession of said real and personal estate under said will; that he has ever since been in the possession of said real estate, and has converted said personal estate to his own use.

The third paragraph alleges that said Abigail died indebted to the plaintiffs in the sum of two thousand four hundred and thirty-seven dollars, for money had and received, goods sold and delivered, and rents of real estate belonging to said plaintiffs; that she made a will, disposing of her property as stated in the first paragraph; that no letters of administration or testamentary were granted; that she died the owner of certain real estate, of the value of two thousand five hundred dollars, and personal property of the value of fifteen hundred dollars; that Thomas E. Davis took possession of the real estate and has since held and enjoyed the same, and took possession of the personal estate, and converted the same to his own use; wherefore, etc.

Thomas E. Davis demurred to the first and second paragraphs, for the reason that they do not state facts sufficient to constitute a cause of action. He also demurred to each of the paragraphs because the plaintiffs had not capacity to sue. James N. Davis demurred to each paragraph of the complaint, for the reason that neither of them stated facts

sufficient to constitute a cause of action. Hester Davis, the other defendant, did not demur at all.

Two questions arise out of this action of the court; first, conceding that the plaintiffs had a valid claim against the deceased, Abigail Davis, can they enforce it against her estate in the hands of the defendants, Thomas E. Davis and Hester Davis, the devisee and legatees, under her will, except through an executor of her will, or an administrator with the will annexed? and, second, is Thomas E. Davis liable, upon the facts stated, as an executor *de son tort*, on account of his intermeddling with her estate?

Upon the first point there should no longer be any doubt. The object of our statute with reference to the settlement of decedents' estates is to reduce the estate to money, in the hands of a responsible executor or administrator, to pay preferred claims first, where the assets will not pay all in full, and then pay the residue *pro rata*; or, when the assets are sufficient, to pay all in full. The heirs, devisees, and distributees of a decedent are liable to the extent of the property received by them from the decedent's estate, to any creditor whose claim remains unpaid, who, six months prior to the final settlement was insane, an infant, or out of the State; but such suit must be brought within one year after the disability is removed. 2 G. & H. 534, sec. 178.

This statute seems to contemplate cases where there has been an executor or administrator of the estate, for in no other case could there have been a "final settlement." The statute secures to the creditor the right to take out letters, if no preferred party shall do so within a limited time; and there is, therefore, no necessity for proceeding in the manner resorted to in this case, nor do we think it can be done. But when, prior to our present statute, this remedy was allowed in chancery, a single creditor, or a few of the creditors of the deceased debtor, could not, by a suit in chancery, have the property of the estate sold for the payment of his or their own demands, without an inquiry as to the rights of other creditors. *Barton v. Bryant*, 2 Ind. 189;

 Hunter v. Thomas.

McNaughtin v. Lamb, 2 Ind. 642; *Butler v. Jaffray*, 12 Ind. 504; and *The N. W. Conference of Universalists v. Myers*, 36 Ind. 375.

On the other point, our opinion is that the facts alleged are sufficient to show a liability on the part of Thomas E. Davis, as executor *de son tort*, to the plaintiffs. Every person who unlawfully intermeddles with any of the property of a decedent is chargeable as an executor of his own wrong, and is liable to an action by any creditor, etc., to the extent of the damage occasioned thereby, and must account for the full value of such property, with ten per centum thereon, etc. See 2 G. & H. 488, sec. 15; *Leach v. Prebster*, 35 Ind. 415, and cases therein cited.

If a creditor, when suing an executor *de son tort*, should, under our statute, sue not only for himself, but also for the other creditors, if any, with a view to a division of the proceeds of the action among all the creditors, according to the amount of their claims, that question is not so presented in this case as to require or justify its decision.

The judgment, as to Thomas E. Davis, is reversed, with costs; and as to the other appellees it is affirmed; and the cause is remanded.

T. C. Slaughter, G. V. Howk, and C. D. Howk, for appellants.

S. K. Wolfe, for appellees.

HUNTER v. THOMAS.

PRACTICE.—*Appeal.—Evidence.*—To justify the Supreme Court in reversing a judgment, error must affirmatively appear by the record. If evidence excluded might have been objectionable as irrelevant under the issues, or under the evidence, it will be presumed to have been properly excluded, where none of the evidence is in the record.

APPEAL from the Warren Circuit Court.

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FRAZER, J.—Error must affirmatively appear by the record, to justify this court in reversing a judgment. In the case before us, the complaint is that the court below erred in excluding evidence offered by the appellant, who was defendant below. If the evidence which had been given by the plaintiff had identified the transactions which constituted the basis of the alleged malicious prosecution as having occurred in the month of May and not in September, as indeed may possibly be inferred from the language of the bill of exceptions, then the excluded evidence, tending to prove that in September the plaintiff had done such acts as would afford probable cause for a prosecution against him for an offence similar to that charged in the prosecution alleged to be malicious, would have had no pertinency to the case. No part of the evidence is in the record, and we may, therefore, assume in support of the judgment, that the evidence was of the character indicated. It is certainly clear that actual guilt of assault and battery in September would afford no cause for a prosecution for an assault and battery committed in May.

There have been, in this court, many applications of the rule, that a judgment will not be reversed unless error affirmatively appears. Thus, the refusal of instructions to a jury which state the law correctly will not reverse, unless it appears that the instructions were applicable to the evidence; otherwise it will be presumed that they were not. *Stump v. Hart*, 14 Ind. 438; *Coyner v. Lynde*, 10 Ind. 282. So, where the nature of the evidence does not appear, instructions given will be sustained if right in any possible state of facts. *Id.* See, also, *Manly v. Hubbard*, 9 Ind. 230, and note 3. In *Blaney v. Findley*, 2 Blackf. 338, it was said, "If there were any facts that could have been legally before the court that would authorize their judgment, we are bound to sustain it." In *Rogers v. Lamb*, 3 Blackf. 155, evidence had been admitted below, the relevancy of which did not appear from the record, the whole evidence not being incorporated. Judge BLACKFORD said, "Circumstances may easily be conceived

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of, under which this affidavit was admissible; and, in support of the judgment below, we must presume that such circumstances existed."

The rule is wholesome. It leaves little room to the party appealing to this court to hope to obtain a reversal by omitting from his bill of exceptions matter essential to a fair review of the action of the lower court.

Affirmed, with costs.

ON PETITION FOR A REHEARING.

PETTIT, J.—This case was decided by our predecessors, judges of this court, more than a year ago, and is now before us on a petition for rehearing. Both parties have presented long and earnest briefs, and after a careful consideration of them, the record, original briefs, and the opinion in the case, we approve of the latter, and overrule the petition.

B. F. Gregory, J. Harper, and J. McCabe, for appellant.

L. T. Miller and J. M. Butler, for appellee.

WHITEHALL v. CRAWFORD ET AL.

PRACTICE.—*Agreed Statement of Evidence.*—Where the title of the case is given in an agreement that certain facts shall go to the jury as admitted without the introduction of record evidence thereof, and this is signed by the plaintiffs and some of the defendants, and a defendant whose name is not signed is present in court and does not object to the introduction of the agreement in evidence, he cannot afterward be permitted to make the objection.

JUDGMENT.—*Without Relief.—Fraud.*—Where judgment creditors sue to recover of the defendant the value of property fraudulently sold to him by the judgment debtor, to defeat their claims, judgment in their favor cannot be rendered without relief from valuation or appraisement laws.

APPEAL from the Fountain Common Pleas.

BUSKIRK, J.—This action was brought by George Crawford and thirty-six others, against the appellant, Phillip A.

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B. Kennedy, Monroe M. Milford, Phocian S. Hicks, and John H. Hoffman. The complaint averred, in substance, that the plaintiffs had obtained separate judgments for certain specified sums against the defendant Kennedy; that executions had been issued thereon and returned not satisfied for want of property on which to levy; that the said Kennedy had no property out of which the said judgments could be made in whole or in part; that the said judgments were unsatisfied in whole or in part; that the said Kennedy was engaged in the drug business, in Attica, Fountain county, Indiana; that the said Kennedy was indebted to the plaintiffs for goods by them sold to him in the said business; that the said Kennedy, for the purpose of cheating and defrauding the plaintiffs out of said debts, conspired, combined, and confederated with the other defendants, and made a fraudulent transfer of the said stock of goods and the fixtures to the said other defendants; that said other defendants had full knowledge of the indebtedness of the said Kennedy to the plaintiffs, and of his intention to cheat and defraud them, and made the said fraudulent purchase with the view, and for the purpose of aiding and assisting in the perpetration of the said fraud; that the said defendants, other than Kennedy, took possession of the said stock of goods, and sold and disposed of the same, and converted the same and the proceeds thereof to their own use; that the said drugs were of the reasonable value of six thousand dollars; that the same were so scattered and disposed of that they could not be identified and levied upon; and that the said defendants never paid any part of the value of the said goods to the said Kennedy or any other person. The prayer of the complaint was for a judgment declaring the said sale to be illegal and fraudulent as to the plaintiffs, and for the value of the said goods so wrongfully converted.

All the defendants answered by a denial, and the appellant filed an additional paragraph, alleging that he had purchased the said stock of goods in good faith and for a valuable consideration.

The cause was tried by a jury, who found for Milford, Hicks and Hoffman, and against Kennedy and the appellant. The jury, also, in answer to special interrogatories, found the dates and amounts of the judgments in favor of the plaintiffs and against Kennedy. The jury also found the following facts:

19. That the demands of the plaintiffs were due and owing to them, on or before the 1st day of November, 1865.

20. That all of the demands of the plaintiffs were reduced to judgments, and that executions had been issued thereon, and returned no property found whereon to levy before the commencement of this action.

21. That Alexander L. Whitehall knew, when he took the property of Philip A. B. Kennedy, mentioned in the complaint, that Kennedy was conveying the same to defraud his creditors, the plaintiffs, and that Whitehall accepted the same with intent to defraud said creditors.

22. The property received by Whitehall from Kennedy was of the value of three thousand six hundred and thirty-seven dollars and eighty-seven cents.

23. That Kennedy had no property, either real or personal, out of which plaintiffs' claims could be paid.

The court, over a motion for a new trial, rendered judgment on the verdicts. The court rendered a judgment in favor of plaintiffs, and against the appellant, for three thousand six hundred and thirty-seven dollars and eighty-seven cents, and that the same should be collectible without relief from the valuation or appraisement laws. After the rendition of the judgment, the appellant moved the court to modify the said judgment so as to provide that the same should be collected with relief, which motion the court overruled. Proper exceptions were taken to all these rulings. Whitehall alone appeals.

Only three of the errors assigned can be considered by this court; first, overruling motion for a new trial; second, the giving of instructions one, two, and three; third, overruling motion to modify the judgment.

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The evidence is properly in the record. We have read and duly considered all the evidence, and entertain no doubt that the findings of the jury were fully sustained thereby. The evidence would have justified a finding for a much larger sum. It seems to us that the appellant should be entirely satisfied with the general verdict, as it is far more favorable than he had any right to expect or demand.

But it is maintained that there was no evidence as to the indebtedness of Kennedy to the plaintiffs, that was binding upon the appellant. There was an agreed statement of facts which was read in evidence, but it is insisted that such evidence was only binding on Hoffman, for the reason that it was signed only by him. The agreement was properly entitled as to the parties and the court. It then contains an agreement as to the dates and amounts of the judgments in favor of the plaintiffs and against Kennedy, and that the same should be read in evidence in the place of the records. It was signed by Buchanan and Davidson, attorneys for plaintiffs, and John H. Hoffman, defendant. The appellant was in court in person and by attorneys, and the agreed statement of facts was read in evidence without objection. If the appellant had any objection to the admission of the agreement in evidence, then was the time for him to speak. Having remained silent when he should have spoken, it would be a fraud upon the court below and the plaintiffs, and a reproach to the administration of justice, to permit the appellant, for the first time, to insist in this court that he was not a party to the agreement. His name was mentioned in the agreement as a party. The agreement was made by the parties to save time and to avoid the production of the record evidence of thirty-seven judgments, and was read without objection. The law, as well as sound morals, requires that the utmost good faith should be maintained by all persons engaged in the administration of justice. When an agreement is once made, it should be honestly and faithfully executed, or if any attorney finds that he has made an agreement prejudicial to the interest of his client, he should go to his adversary and inform him that he

will not stand by his agreement. If this course had been pursued in this case, the plaintiffs would have produced the record evidence, but it was not done. The appellant and his attorneys remained silent and permitted the agreement to be read without objection. His objection cannot be heard in this court. We are of the opinion that the agreement is properly in the record.

We have examined the instructions given and those refused, and are of the opinion that the court committed no error in either giving or refusing to give instructions. The counsel for the appellant has failed to point out any objection to the instructions given by the court; nor have they urged any reason or referred to any authority to show that the court erred in refusing to instruct as requested. Under these circumstances we do not feel called upon to set out the instructions, or vindicate the action of the court below. We are of the opinion that the court committed no error in overruling the motion for a new trial.

The third error assigned calls in question the correctness of that portion of the judgment which directs the sale of property without appraisement.

The appellees attempt to support the judgment on two grounds; first, that the claims in favor of plaintiffs and against Kennedy waived the appraisement laws, and that the judgments rendered thereon directed a sale without appraisement; second, that section 456, 2 G. & H. 244, provides, that "property conveyed by a debtor with intent to hinder, delay, or defraud creditors shall be sold without appraisement."

If this proceeding had been to set aside the sale of the property by Kennedy to the appellant as fraudulent, and that the same should be subjected to sale to satisfy the judgments of the plaintiffs, there would be no doubt that the specific property so fraudulently sold would be sold without appraisement; but this is an action to recover the value of the property wrongfully converted by the appellant; and we are of the opinion that the provision of the statute, in refer-

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ence to the property fraudulently conveyed, cannot be extended to a personal judgment for the wrongful conversion of property fraudulently sold.

The general rule is, that property shall be sold, on a judicial sale, with appraisement. It requires an express agreement to waive the appraisement, except as otherwise provided by law. It is provided by section fifteen of an act concerning promissory notes, etc., 2 G. & H. 659, that, "upon any instrument of writing, made within this State, or elsewhere, containing a promise to pay money without relief from valuation laws, judgment shall be rendered and execution had accordingly."

The judgments in favor of plaintiffs and against Kennedy are only evidence of the indebtedness. The appellant was not a party to them, and is not concluded by them. The execution will not be issued on said judgments, but on the one against appellant. There was no agreement on his part to waive appraisement, and we are of the opinion that the court erred in directing a sale without appraisement.

But we do not think that for this error a new trial should be granted. The justice of the case does not require it. The error can be corrected by this court. Such was the course pursued by this court in the case of *The Cincinnati, Peru, and Chicago Railroad Company v. Walker*, 14 Ind. 364.

That portion of the judgment which directs that the same should be collected without appraisement is reversed, with costs, and as to the residue of the judgment, it is affirmed.

A. A. Rice and *M. M. Milford*, for appellant.

T. F. Davidson and *J. Buchanan*, for appellees.

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JUDGMENT.—Correction.—Where a judgment by default has been entered for a sum too small, as appears on the face of the papers, through an error of the clerk, the judgment may be corrected, on motion, at a subsequent term, although the amount for which it has been erroneously entered has been paid.

APPEAL from the Cass Common Pleas.

DOWNEY, J.—The appellees sued the appellant on a promissory note for five hundred dollars, made on the 6th day of November, 1865, payable on or before the 25th day of December, 1867, with interest from date, admitting, in the complaint, that he had paid one hundred dollars of the amount thereof. Judgment by default was rendered on the 27th day of July, 1869, for one hundred and five dollars and eighty-three cents. On the 6th day of August, 1869, which was during the same term of the court, the defendant moved the court to set aside the default, and in his affidavit stated that he had paid on the note one hundred and twenty dollars. He also had filed answers to interrogatories, which had been filed with the complaint; and in answer to a question as to whether he had ever paid any more on the note than the one hundred dollars indorsed thereon, he said he had made payments, in property, over and above the one hundred dollars indorsed on the note, but could not state the time or place, nor did he name the articles in which he had made the payments. The court overruled the motion.

At the July term, 1870, the plaintiffs moved the court, upon a written motion, to amend the judgment as to the amount, alleging that there was due on the note, at the date of the judgment, five hundred and five dollars and eighty-three cents, and that the clerk of the court, by mistake, entered up judgment for one hundred and five dollars and eighty-three cents only, four hundred dollars less than the plaintiffs were entitled to recover.

The defendant appeared to the motion, and filed a demurrer thereto, as the record recites, which was, on motion of

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the plaintiffs, stricken out, and a demurrer is copied into the record by the clerk, but it is not made part of the record by bill of exceptions. This is the first error assigned. Under repeated decisions of this court, we cannot judicially notice a pleading which has been stricken out, merely because the clerk has copied it into the record. It must be replaced in the record by bill of exceptions. *Hill v. Jamieson*, 16 Ind. 125; *Searl v. Smith*, 15 Ind. 23; *Urton v. Luckey*, 17 Ind. 213. But if the demurrer was properly in the record, and the question as to the right of the defendant to demur to the motion was before us, see *Goodwine v. Hedrick*, 29 Ind. 383; *Jenkins v. Long*, 23 Ind. 460.

The court heard the evidence and made the desired correction in the judgment. The defendant, without any motion for a rehearing of the matter, excepted, set out the evidence in a bill of exceptions, and appealed to this court. It is alleged that the court erred in allowing evidence which was not a part of the record; in permitting the plaintiffs to introduce irrelevant testimony; in allowing the introduction of oral evidence; in sustaining the motion to correct the judgment; and in permitting the judgment to be amended after it had been paid and satisfied.

It is as clear as mathematics can make it, that the plaintiffs were, upon the complaint and default, entitled to a judgment for the amount of the note, less the one hundred dollars credited on it, which was five hundred and five dollars and eighty-three cents. The default admitted the facts set out in the complaint, and a calculation, which the court or the clerk under its direction was authorized to make, would have shown the amount for which judgment should have been rendered. The endorsement on the note shows that the payment of one hundred dollars was made on the 21st day of January, 1868. The entry on the judge's docket shows that the amount of the judgment was one hundred and five dollars and eighty-three cents; but this only shows that the mistake was common to the clerk and judge, or that it originated with the entry by the judge and was perpetuated by the

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clerk in entering up the judgment. It was, in either case, the mistake of the clerk. But counsel for the plaintiffs testifies that he calculated the amount due on the note, and handed the note to the clerk. The original note given in evidence has this memorandum on it. The fact that the defendant had paid the one hundred and five dollars and eighty-three cents would be no objection to the correction of the judgment. He would have that much less to pay after the judgment was corrected. Although counsel for the appellant have made an extensive and ingenious argument in favor of their side of the case, we cannot see the least merit on their client's side of the controversy. The case is much like that of *Jenkins v. Long, supra*. If there is any difference, it is in favor of the case under consideration.

Judgment affirmed, with costs.

D. B. McConnell and *H. C. Thornton*, for appellant.

A. M. Flory, for appellees.

MARKS, TREASURER OF TIPPECANOE CO., v. THE TRUSTEES OF PURDUE UNIVERSITY.

AGRICULTURAL COLLEGE.—*Donations by Counties for Location.—Want of Power.—Ratification.—Statutes.*—On the 14th of January, 1869, no board of commissioners of any of the counties of this State possessed the power to make a donation for the purpose of securing the location, within their jurisdiction, of the agricultural college, contemplated in the passage of the act of Congress of July 2d, 1862, and the act of the legislature of this State, of March 6th, 1865. But when an order was passed by any board of county commissioners, making an appropriation for that purpose, the order was not void, but was capable of ratification by the legislature.

SAME.—Such an order, passed by the Board of Commissioners of Tippecanoe county on the 14th day of January, 1869, was ratified and rendered valid by the act of the legislature of May 6th, 1869, accepting the donation and locating the college in that county.

SAME.—*Treasurer.—Warrant.—Interest.*—When a warrant was issued by the auditor of that county upon the treasurer, for an instalment of money due under said order, it was the duty of the treasurer to pay the same, if there

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were sufficient funds for that purpose, or if there were not, to indorse on such order "not paid for want of funds," and the instalment would bear interest from that date, although the order of the board provided for the payment of the sum donated, in five yearly instalments, without interest.

SAME.—*Local Object.—Taxation.—Constitution.*—An obligation entered into by the county, for the purpose of securing such location of the college, is solely a county purpose, local in its nature, and properly assessed and collected as are taxes for other county purposes. Such taxation is under the general law, and, therefore, the act of the legislature ratifying the donation is not in conflict with article 4, section 22, of the state constitution, on the subject of special or local legislation, nor with article 10, section 1, requiring a uniform and equal rate of assessment and taxation.

SAME.—*Consideration.—Benefits.*—The benefits conferred on the county, of a local character, were sufficient consideration for the promise to pay for the location of the college within its limits.

APPEAL from the Tippecanoe Common Pleas.

WORDEN, C. J.—On the 2d of July, 1862, an act of Congress was approved, by which it was provided, "that there be granted to the several states, for the purposes hereinafter mentioned, an amount of public land, to be apportioned to each state a quantity equal to thirty thousand acres for each senator and representative in Congress to which the states are respectively entitled by the apportionment under the census of 1860."

The purpose declared was "the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the states may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life."

On March 6th, 1865, the legislature of the State of Indiana passed an act accepting and claiming the benefits of the provisions of said act of Congress, assenting to all the conditions and provisions thereof. 3 Ind. Stat. 8.

On the 14th of January, 1869, the board of commissioners of Tippecanoe county made the following order:

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"Come now, John Rosser, Martin L. Pierce, H. T. Sample, Adams Earl, O. W. Pierce and others, and present their petition, which reads as follows, to wit: 'To the Honorable Board of Commissioners of Tippecanoe County, Indiana. The undersigned citizens, deeming it greatly to the interest of the county of Tippecanoe to secure the location of the agricultural college within the said county, and believing that the same might be obtained if your honorable board would pass an order proffering to make a liberal donation to said college (naming the amount in the order) in case of its location here, would respectfully petition your honors to pass such order without delay.' Whereupon it is ordered by the board that the sum of fifty thousand dollars, to be paid in five annual instalments of ten thousand dollars each, without interest, be, and the same is hereby donated, and the same to be paid out of the treasury of said county for the purpose of securing the location of the agricultural college in said county, said payments to begin one year from the date of the location of said college."

On May 6th, 1869, an act of the legislature was approved, accepting certain donations offered, including that of Tippecanoe county, locating the college in that county, and naming it the "Purdue University." 3 Ind. Stat. 12.

In order to a clear understanding of the questions involved, we here set out such portions of the statute last cited as bear upon them.

"Sec. 1. Be it enacted by the general assembly of the State of Indiana, that the donations offered by John Purdue, as set forth and communicated to the present general assembly in the message of the governor, on the 16th day of April, 1869, and the donations offered by the county of Tippecanoe, and the trustees of the Battle Ground Institute, and the trustees of the Battle Ground Institute of the Methodist Episcopal church, as set forth and communicated to the general assembly at its last session, in the message of the governor of the 27th day of January, 1869, be, and the same are hereby accepted by the State of Indiana.

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"Sec. 2. The college contemplated and provided by the act of Congress, approved July 2d, 1862, entitled 'an act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts,' is hereby located in Tippecanoe county, at such point as may be determined before the 1st day of January, 1870, by a majority vote of the trustees of the Indiana Agricultural College; and the faith of the State is hereby pledged that the location so made shall be permanent.

"Sec. 3. In consideration of the said donation by John Purdue, amounting to one hundred and fifty thousand dollars, and of the further donation of one hundred acres of land appurtenant to the institution, and on condition that the same be made effectual, the said institution, from and after the date of its location as aforesaid, shall have the name and style of 'Purdue University,' and the faith of the State is hereby pledged that said name and style shall be the permanent designation of said institution, without addition thereto or modification thereof.

"Sec. 6. This act shall be subject to future amendment or repeal, except so far as it provides for the acceptance of donations, the location of the college, and the name and style thereof, and the rights and privileges conferred upon John Purdue."

On June 7th, 1870, the auditor of Tippecanoe county issued his order or warrant, directed to the treasurer of the county, requiring the latter to pay to the treasurer of the university ten thousand dollars "for the first instalment of appropriation, made January 14th, 1869." The warrant being presented to the county treasurer for payment, he refused either to pay the same, or endorse thereon "not paid for want of funds."

This action was instituted, by way of mandate, to compel payment of the warrant. Judgment below for the appellee, the university.

Besides the main question in the cause, whether the board of commissioners had the power to make the order in ques-

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tion, some other objections of a more technical character are made to the proceedings below. It is objected that the affidavit did not show that there were funds in the treasury, with which to pay the warrant. This, we think, was not necessary. The appellee had the right to have the warrant paid if there were funds for that purpose, and if not, to have it indorsed, "not paid for want of funds." 1 G. & H. 641, sec. 8. But the appellant insists that no such indorsement, thereby putting the order upon interest, should be made, for the reason that by the terms of the order making the donation, the instalments were to be paid without interest. The fair construction of the order of the board is, as we think, that none of the several instalments should bear interest until they respectively became due. After an instalment became due, and a warrant was issued for it, if it could not be paid for want of funds, we see no reason why it should not bear interest like any other county order not paid for want of funds. It may be observed that it was shown, on the hearing, that there were funds in the treasury for the payment of the order.

Again, it is claimed that the college had not been located in Tippecanoe county, and, therefore, that no instalment of the donation had become due. We have seen by the statute above set out, passed more than a year before the issuing of the warrant in question, that the college was not only located in Tippecanoe county, but the legislature failed to reserve the right to change the location by way of repeal or amendment, and pledged the faith of the State that the location should be permanent. The precise point in Tippecanoe county, at which the college should be located, was not determined by the act above set forth; that was left to the determination of the trustees, etc.

The order of the board of commissioners making the donation did not require the college to be located at any particular point in the county, but simply "in said county." The act clearly established the location in the county.

We come to the question as to the power of the board to make the order.

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No statute has been cited, and we are not aware of the existence of any, in force at the time, that authorized the making of the order. It follows that the order was made without legislative authority. Still it was not void in that absolute sense that made it incapable of ratification. If a party, without authority, but professing to act as the agent of another, does an act in the name of his supposed principal, the act is not absolutely void, but may be ratified by the supposed principal, and when so ratified it is as valid as if the pretended agent had had full authority when the act was done. That an order of the board of commissioners, made without authority of law, may be ratified and rendered valid and effectual, is established by the numerous cases in this court upholding the act of March 3d, 1865, 3 Ind. Stat. 565, legalizing bonds, orders, and appropriations made for the purpose of procuring or furnishing volunteers and drafted men, etc.

Has there been such a ratification by the legislature in the case under consideration? This question must be answered in the affirmative, unless we are to impute to the legislature bad faith, as well as the absurdity of inserting a clause in the statute above set out utterly destitute of meaning or significance. It is enacted in the first section, "that the donations offered by John Purdue * * * and the donations offered by the county of Tippecanoe * * * be and the same are hereby accepted by the State of Indiana." Did the legislature, amidst the struggle of other portions of the State to procure the location of the college, and under the pretence of accepting the donation offered by Tippecanoe county, intend to favor that county with the location, and at the same time let her escape payment of the proffered donation on the ground that her commissioners had not the authority to make it? No such design can legitimately be imputed to a co-ordinate department of the government without cogent and conclusive reasons. None such exist in the case. The acceptance of the donation necessarily implies the power to make it, and is as perfect a legislative

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ratification of the act of offering it as could be a law ratifying it in express terms. This must be construed to have been the intention of the legislature; otherwise that portion of the law accepting the donation of Tippecanoe county would be meaningless and inoperative. We conclude, therefore, that the proceedings of the board in making the order in question were ratified and made valid by the legislature, unless some defect existed in the power of the legislature to make such ratification.

Treating the law as being an intended ratification of the proceedings of the board of commissioners, two objections are made thereto; first, that it requires local taxation for a state purpose; and, second, that it is a special law and not of uniform operation.

The sole object and purpose of the donation was to secure the location of the college in Tippecanoe county, as may be gathered from the petition filed before the board and the action of the board thereon.

It does not appear that the donation was made, as is argued by counsel for the appellant, to aid in the erection of a college building, which it was the duty of the State to erect and maintain. It may be conceded that the college or university is a state institution; and the question arises whether taxes may be assessed in a county to liquidate a debt contracted by the county in securing the location of such state institution in the county; for if not, the debt cannot be valid.

The constitution provides, art. 4, sec. 22, that "the general assembly shall not pass local or special laws, in any of the following enumerated cases; that is to say * * * for the assessment and collection of taxes for state, county, township, or road purposes."

"Section 23. In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state."

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While the university is a state institution, and every citizen will have an equal right, under the same circumstances, to avail himself of its privileges, still the location of it in a given county will, doubtless, confer upon that county many local benefits of pecuniary value. The parents of the county can send their sons and perhaps their daughters to the college to be educated, at a less expenditure of time and money than would be incurred if it were situated at a more remote point in the State. The college, with its professors, tutors, attendants, and students, will probably diffuse much more money throughout the community than would otherwise circulate. It may also add to the educated and intelligent population of the place, and be the means of stimulating the industry and increasing the wealth and moral worth of the community, thereby enhancing the attractions of society and the value of property.

There may be other and greater local benefits than those above glanced at.

Now, it seems to us, that taxes collected to discharge an obligation entered into by the county, solely for the purpose of securing the location of the college in that county, cannot be said, in any just sense, to be collected for any state purpose. On the contrary, they are solely for a county purpose. Were they for state purposes, they would have to be assessed uniformly throughout the State, in accordance with section 1 of article 10 of the constitution.

The fact that the college is a state institution cannot change the character or nature of the transaction. Railroads are, in some sense, state institutions; and yet local subscriptions by counties and cities are upheld. Highways and streets are state institutions, to the proper use and enjoyment of which all citizens have an equal right; yet local taxation, to improve and keep them in order, is constantly maintained. The taxation required being merely for a county purpose, the provisions of section 1 of article 10 are complied with if the taxes are uniform throughout the county. *Bright v. McCullough*, 27 Ind. 223; *Palmer v. Stumph*, 29 Ind. 329.

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The constitution, in section twenty-two of article four, above quoted, does not inhibit the passing of local or special laws whereby a debt may be contracted by a county. It simply inhibits the passage of such laws for the assessment and collection of taxes for the purposes named therein.

The law under consideration is not one for the assessment and collection of taxes. It is simply a law, so far as the point under consideration is concerned, to ratify and accept the donation offered by Tippecanoe county.

There needs to be no special or local law to enable the county to raise the funds necessary to meet her obligation. The general law is ample for that purpose. 1 G. & H. 249, sec. 13; *id.* 68, sec. 1.

It remains to inquire whether the law in question is objectionable as being local or special, when a general law could have been made applicable; or, in other words, whether it violates section twenty-three above quoted. The subject of the law was local, and where such is the case, the objection cannot prevail. *Cash v. The Auditor of Clark Co.*, 7 Ind. 227; *Stocking v. The State*, 7 Ind. 326. The college could have but one location; and but one county could have actually made a donation on condition of its location therein, as the condition could only have been performed as to one county. The case falls clearly within those above cited.

There are numerous laws found in the statute book, that may, in some sense, be said to be local or special, but which are upheld. Thus there are laws creating criminal courts in particular counties. 3 Ind. Stat. 172, *et seq.*

In *Gentile v. The State*, 29 Ind. 409, it was decided by this court that it was exclusively for the legislature to judge whether a law on any given subject, not enumerated in section twenty-two, could be made applicable to the whole State. On this point we find it unnecessary to express any opinion, as we are satisfied that no valid objection to the law exists.

There can be no doubt, on general principles, that the location of the college in Tippecanoe county was a sufficient

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consideration to support the promise on the part of the county. The offer on the part of the county, and its acceptance by the legislature, together with the location of the college in Tippecanoe county, constituted a valid and binding contract.

We find no error in the record.

The judgment below is affirmed, with costs.

G. O. Behm and *A. O. Behm*, for appellant.

H. W. Chase, *J. A. Wilstach*, *J. R. Coffroth*, *T. B. Ward*, and *J. A. Stein*, for appellees.

BUSH v. BUSH.

DIVORCE.—*Custody of Children.*—In granting a divorce, the court has the power to decree the custody of the minor children, or any of them, to the party most suitable, considering the sex and age of the children and qualification of the parties.

SAME.—*Provision for Children.*—It is the duty of the court on granting a divorce, where there is property, to make reasonable provision for the care and custody of any children of the marriage.

SAME.—*Alimony.*—Where there is an estate of twenty thousand dollars, accumulated during the marriage by the joint efforts of husband and wife, a fourth in value given to the wife is not unreasonable, where the divorce is granted for the misconduct of the husband.

APPEAL from the Boone Common Pleas.

BUSKIRK, J.—The appellant filed a complaint in the court below against the appellee for a divorce. The appellee answered the complaint by a denial, and filed a cross complaint for divorce, alimony, and the custody of the female minor children. The appellant denied the allegations of the cross complaint.

The cause was tried by the court, and resulted in a finding in favor of the appellee upon the charges of misconduct contained in the original complaint, and that the appellant

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had been guilty of cruelty toward his wife, and that she was entitled to a divorce therefor. The court decreed a divorce to the appellee, and gave her the care and custody of the four female minor children, and gave the appellant the care and custody of a minor son. The court also decreed the appellee five thousand dollars of alimony, and one hundred dollars a year for each of the children placed in the care of the appellee, until they should respectively arrive at the age of eighteen, subject to any modification that might be made upon application of either party.

The court overruled a motion for a new trial, to which the appellant excepted.

The first error to which our attention has been called is the action of the court in overruling a motion to strike out parts of the cross complaint, but the question is not presented by a bill of exceptions, and, therefore, constitutes no part of the record, and no error can be assigned thereon.

The next error assigned is the overruling of the motion for a new trial. It is earnestly maintained that such ruling was erroneous for several reasons:

First, that the finding of the court was not sustained by, but was contrary to, the evidence.

The evidence is properly in the record. It covers seventy-four pages. We have read it with great care and attention, as we have the very able and lengthy briefs of the counsel, and we are entirely satisfied that the finding of the court upon the question of divorce is fully sustained by the evidence. We have not deemed it necessary to set out, in this opinion, the charges made against each other by the parties to this action; nor do we think that any good would result to the profession or society by setting out the evidence that was admitted to sustain such charges.

It is next insisted that the court possessed no power to decree the custody and care of the minor daughters to the appellee. We think otherwise. Section 21 of the divorce law provides, that "the court in decreeing a divorce shall make provision for the guardianship, custody, and support

and education of the minor children of such marriage." 2 G. & H. 353. It has been held by this court, in several cases, that it is the imperative duty of the court, in decreeing a divorce, to make provision for the guardianship, custody, support, and education of the minor children. *Rice v. Rice*, 6 Ind. 100; *Whitsell v. Mills*, 6 Ind. 229; *Rourke v. Rourke*, 8 Ind. 427; *Williams v. Williams*, 13 Ind. 523; *Cox v. Cox*, 25 Ind. 303; *Ewing v. Ewing*, 24 Ind. 468; *Hyatt v. Hyatt*, 33 Ind. 309.

It is next claimed that the court erred in giving the care and custody of the minor daughters to the mother. It is insisted that it is demonstrated, by the evidence, that Mrs. Bush was an unfit and improper person to have the care and custody of her minor daughters. This family controversy does not differ, in one respect, from all others that have come under our observation, and that is, that it makes no difference who was in fault in the beginning, the other party is frequently in the wrong before it ends. The evidence shows that Mrs. Bush was not blameless by any means. But considering all the evidence, the sex and ages of the children assigned to her care, we are satisfied that the court below acted wisely and discreetly in giving the custody of the daughters to the mother, instead of the father. This order is subject to the control of the lower court, and may be changed upon good cause shown.

It is next maintained, with great earnestness, that the court erred in its decree for alimony. It is claimed that the alimony is too large.

Section 19 of the divorce act (2 G. & H. 353) provides, that "the court shall make such decree for alimony in all cases contemplated by this act as the circumstances of the case shall render just and proper." What are the circumstances surrounding this case? The parties were married in 1846, and lived together as husband and wife until 1870. When they were married, they were both young and very poor. Shortly after their marriage, the father of Mrs. Bush gave to Mr. Bush forty acres of land, upon which they set-

tled and erected a home. During the marriage, twelve children were born, nine of whom are living. When the separation took place, the appellant was worth at least twenty thousand dollars. The counsel for appellant admit, in their brief, that he was worth that sum, while the counsel for the appellee insist that he was worth several thousand dollars more. This accumulation of property was the result of the joint labor, industry, and economy of husband and wife. The evidence shows that the real estate of the appellant was worth about seventeen thousand dollars. The decree for divorce deprives Mrs. Bush of any interest in these lands, or in his personal estate. The counsel for the appellant, in their brief, lay down this proposition of law: "When the husband causes the separation, the rule is to put the wife in a condition not worse than if he had died. To give her less would be permitting the husband to profit by his own wrong." It is due to the counsel for the appellant that it should be stated that the above proposition was made on the theory that the wife had been kind and faithful and had not caused the separation, and that it was contended that under the proof in this case the appellee was only entitled to a bare support.

The court found that the appellee was not guilty of the charges made against her, and that the appellant was guilty of a part of the charges made against him, and we are satisfied that the evidence abundantly and conclusively showed that he was guilty of other charges preferred against him. Then the husband caused the separation. If he was dead, she would be entitled to one-third of his real estate, and five hundred dollars worth of the personal estate as against the heirs and creditors, which would be far more than the amount decreed to her by the court. If the divorce had been decreed for the fault of the appellee, it would have been the duty of the court to have made reasonable provision for her comfortable support. The statute not only requires the court, on decreeing a divorce, to provide for the guardianship and custody of the minor children, but for their support and edu-

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cation. The provision made for the support and education of the minor daughters was not unreasonable. Certainly it was not excessive. It will not pay for their clothing and education.

We are clearly of the opinion that the court committed no error in overruling the motion for a new trial.

The judgment is affirmed, with costs.

J. T. Dye, A. C. Harris, C. C. Galvin, and C. S. Wesner,
for appellant.

T. Patterson, A. J. Boone, and R. W. Harrison, for appellee.

LACEY ET AL. *v.* MARNAN.

COVENANT.—*Evidence.*—In an action for breach of a covenant of seizin, where the complaint alleged that the title to the land described in the deed was in the United States;

Held, that the deposition of a register of the land office of the district in which the land lay was competent evidence to prove the title.

SAME.—*Measure of Damages.*—The measure of damages on the breach of the covenant of seizin, where the grantee receives no title, is the consideration money paid, with interest, or if land be paid by way of exchange, the value of that land.

APPEAL from the Shelby Circuit Court.

DOWNEY, J.—The appellee brought this action against the appellants to recover for a breach of the covenant of seizin in a deed of lands in Iowa. The execution of the deed is alleged in the first paragraph of the complaint, a copy of it is filed therewith, and it is further alleged that the defendants could not warrant and defend the title to the land to the plaintiff, because, at the time of making the deed, nor before or since, had they any title to the same; but the same was government land; that no possession of the land was given or taken, and that he cannot take possession thereof for

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want of title; that an action hath accrued to him to have and demand of the defendants fourteen hundred dollars, with interest thereon from the 28th day of September, 1866, which is the date of the deed. The price mentioned in the deed is, fourteen hundred dollars.

The second paragraph alleges that on the 28th day of September, 1866, the defendants represented to the plaintiff that they were the owners, in fee simple, of the real estate, and on that day, by their deed, a copy of which is filed, bargained, sold, and conveyed the same to the plaintiff for the price of fourteen hundred dollars, which sum he then paid; that the defendants covenanted with the plaintiff, by the deed, that they were the owners of said land in fee simple, had good right and lawful authority to sell and convey the same; that at the time of executing the deed the defendants had no title to the land, but that the same belonged to the United States, and had never been purchased by any one; that, hence, he took no title to said land, and is damaged in the sum of two thousand dollars, for which he demands judgment.

The defendants answered, first, the general denial; second, they admit the execution of the deed, but say the same was executed without consideration; third, that at and before the time of executing the deed the plaintiff was the owner of forty acres of land in Shelby county, Indiana, describing it, then of the value of one thousand dollars; that the plaintiff was then and there desirous of selling said land to the defendants for eight hundred dollars, in cash, and for the conveyance of the Iowa land to the plaintiff, and it was then and there agreed between them, that the plaintiff should convey to the defendants the Shelby county land, and in consideration therefor the defendants should pay to plaintiff said sum of eight hundred dollars and also convey to him said Iowa land, and upon said agreement, the plaintiff conveyed to the defendants said Shelby county land, and they paid him said sum of eight hundred dollars, and executed the deed to the plaintiff for said Iowa land, the same mentioned in the complaint; and that at the time of making said deed, there was no price

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fixed or agreed upon as the value of either tract of land; and that before this action was brought the defendants had paid the plaintiff more than the value of the Shelby county lands, to wit, twelve hundred dollars; wherefore, etc.

The plaintiff, after demurring unsuccessfully to the third paragraph of the answer, replied to the second and third paragraphs thereof by general denial.

There was a trial by the court, and a special finding; but as the court stated no conclusions of law, no question of law is presented thereon. A motion for a new trial was made and overruled, and judgment rendered for the plaintiff.

The first error assigned is that the court improperly overruled the defendants' demurrer to the complaint. The record shows no demurrer, and no such action of the court.

The plaintiff had taken the deposition of the register of the land office at Sioux City, Iowa, in which district the land is situated, to prove that the land had not been sold by the United States. He was asked the question whether the land, describing it, was vacant public land of the United States, subject to entry at his office, on the 28th day of September, 1866, and whether on that day or since it had been entered by any one. He answered that it was on that day vacant public land of the United States, subject to entry at his office, and was still vacant, and had not been entered by any one; that the title had not passed from the government of the United States to any person or persons, state, county, or corporation whatever, but was still in the United States, and was then subject to entry at his office.

On the trial of the cause this deposition was offered in evidence, and the defendants objected to the question and answer above set out, on the ground that the facts sought to be proved thereby could only be proved by the record of the register, or a certified copy thereof, which objection the court overruled, and to which ruling the defendants excepted. The bill of exceptions does not show that any objection was made to this deposition or any part of it before going into the trial. It was probably too late to make the objection on

the trial. 2 G. & H. 178, sec. 266. But we are of the opinion that there was no force in the objection. It was not a certified copy of any record that was desired as evidence; but it was proof that no such record existed. If a sale had been made, there would have been a record or entry of the fact, which might have been copied and certified by the register. But when no sale had been made, and consequently no entry, there was nothing of which a copy could be made out and certified. To show that no marriage had taken place between parties, parol evidence, by the clerk, was allowed, that he had made diligent search of the marriage record, and that no entry of such marriage appeared thereon. *Nossaman v. Nossaman*, 4 Ind. 648. In *Stoner v. Ellis*, 6 Ind. 152, a certificate of the commissioner of patents, under his official seal, was offered in evidence to show that no patent had issued to certain parties, and it was held inadmissible. The learned judge who delivered the opinion of the court said: "We are aware of no rule of law which authorizes a public officer to certify what does not appear in his office, for the purposes of evidence. His deposition should be taken, to prove that upon diligent search the fact did not appear."

The next question relates to the measure of damages. The appellants' counsel contend that the value of the Iowa land was the proper measure, while the counsel for appellee contend that the value of the Shelby county land, less the money paid, with interest thereon, was the measure. Had the Iowa land been paid for in money, there is no question that the money paid, with interest thereon, would have been the proper measure of damages. This is decided in several cases in this court.

It has also been decided that where the vendee has received a deed and has taken possession, he can only recover nominal damages while he has not been evicted. But in this case no title passed by the deed and possession was not taken under it, and there would seem to be no objection to the recovery by the plaintiff of full damages. "No land

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passing by the defendant's deed to the plaintiff, he has lost no land by the breach of this covenant; he has lost only the consideration he paid for it. This he is entitled to recover back, with interest to this time." Sedgw. Dam. 186.

We do not think it can make any difference whether the consideration paid be money or something else. The reason of the rule would be the same in either case.

Judgment affirmed, with five per cent. damages and costs.

B. F. Davis and *B. F. Love*, for appellants.

E. H. Davis and *C. Wright*, for appellee.

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THE TOLEDO, WABASH, AND WESTERN RAILWAY COMPANY v.
CARY.

RAILROAD.—*Fencing*.—*Liability*.—Where the streets and alleys of a town end at a railroad track, and terminate at a high bank, which cannot be used for loading or unloading cars, it is the duty of the railroad company to fence; and it is liable for injury to cattle when it does not fence, without regard to the negligence of the owner of the animals.

APPEAL from the Huntington Circuit Court.

DOWNEY, J.—This action was brought to recover the value of a cow, owned by the appellee, and killed by the locomotive and cars of the appellant, while she was on the railroad track.

The main question is whether or not the appellant was bound to fence the railroad, at the point where the cow was killed, to escape liability.

A plat of the *locus in quo* is in the transcript, but we do not deem it necessary to transcribe it into this opinion. The facts relating to the place in question will be sufficiently understood without it. The railway, at that point, runs almost east and west. The town of Antioch is situated south of the railway, the streets and alleys of which, running north and south, terminate at the railway, except one,

which crosses the same at or near the depot. A road or highway also crosses the track about fifteen rods west of the west switch. It is two hundred feet west from the street at the station to the west end of the switch, two hundred feet from there west to where the cow was killed, and about the same distance from there west to the crossing of the road or highway. The cow was found in a ditch at the road side, nearly opposite the terminus of one of the alleys. The double track extends only from one switch to the other in front of the town, but does not extend to the place where the cow was killed. At the point where the cow was killed there is a deep ditch on the one side, and a steep bank on the other side, making it impossible to use the ground to load or unload goods in or out of cars.

We must hold that it is not shown that the company could not legally and properly have fenced the road at the point where the cow was killed. The fact that the streets and alleys of the town terminate at the railroad is no objection to the erection of a fence. The strip of land over which the company has a right of way is not a public highway, and may be properly inclosed, so far as we can see, by the company. The public right to travel on the streets and alleys can extend no farther than they extend, and at their termini the railroad company, as well as any other owner, has the right to erect a fence. It would not require the fencing up or fencing across any street or alley, in order to inclose that part of the railroad where the animal was killed. Nor would it be fencing the public away from the depot of the road.

But it is insisted that the owner of the cow was negligent in allowing her to run at large, and that for this reason he cannot recover. Where, however, it is the duty of the company to fence the railroad, the question of the negligence of the owner in allowing his animal to run at large does not arise. We discover, however, no greater negligence in this case on the part of the owner, than is to be found in the case of any other owner, who resides near to a railroad and

Ex Parte Proctor.

allows his animals to run at large. Where the road cannot be fenced, and the company is sued for negligence in killing an animal, then, if the owner has been guilty of negligence contributing to the loss, the company is not liable; and to this effect only are the cases to which we are referred by counsel for the appellant.

The judgment is affirmed, with five per cent. damages and costs.*

W. Z. Stuart, for appellant.

B. M. Cobb, for appellee.

*Petition for a rehearing overruled.

EX PARTE PROCTOR.

CRIMINAL LAW.—*Murder.*—*Bail.*—Under an indictment for murder in the first degree, where the evidence was heard on an application to let to bail, the judges of the Supreme Court were equally divided in opinion whether the offence was, under the evidence, bailable or not.

APPEAL from the Judge of the Elkhart Circuit Court.

PER CURIAM.—The appellant was indicted for murder in the first degree, and on being brought before said judge on *habeas corpus* to be let to bail, the judge refused his application and remanded him to jail. From this judgment he appealed to this court. When the case was considered by us at the last term, we were equally divided as to whether the facts showed the crime to be bailable or not. The case was consequently continued until the present term. As there is no question of law in the case, it is but matter of form, in order to comply with the statute, and finally dispose of the case in this court, that we should now state our opinions *seriatim*.

DOWNEY, J.—It is my opinion that upon the facts, as presented to us, the honorable judge who sat on the case below committed no error in refusing to let the prisoner to bail.

Ex Parte Voltz.

BUSKIRK, J.—I concur in the above opinion.

PETTIT, J., and WORDEN, C. J.—We are of opinion that the evidence shows the offence to have been bailable, and, therefore, that the prisoner should have been let to bail.

A. S. Blake, R. M. Johnson, O. H. Main, and W. A. Woods, for appellant.

J. A. S. Mitchell and B. W. Hanna, Attorney General, for the State.

88	175
165	582

EX PARTE VOLTZ.

ESCAPE.—*Judgment against Sheriff.—Recapture.—Bastardy.*—Where a defendant in a bastardy suit is imprisoned for a failure to pay or replevy a judgment rendered against him in such suit, and escapes without the consent of the sheriff, and is not recaptured for three months thereafter, and judgment is recovered against the sheriff, on his bond, for the escape, by the relatrix in the original suit, and the judgment is not paid, the defendant cannot be recaptured and imprisoned. •

APPEAL from the Ripley Common Pleas.

DOWNEY, J.—Voltz petitioned the court for the writ of *habeas corpus*, alleging in his petition that he was illegally restrained of his liberty, in the jail of Ripley county, by George W. Russ, the sheriff, etc., and prayed to be discharged. The sheriff produced the body of the defendant in obedience to the writ which was ordered by the court, and as the cause of his detention stated, in his return, that in August, 1867, in the circuit court, the said Voltz was, in a suit in the name of the State, on the relation of one Louisa Billman, against him, adjudged to be the father of her illegitimate child, and required to pay for its support, etc., certain sums of money. That he failed to pay or replevy the same, and in consequence was committed to the jail of the county by order of the court. He made a copy of the order of commitment part of his return. He further alleged

Ex Parte Voltz.

that on the 26th day of September, 1867, without the consent of the sheriff or the jailer, the defendant, without paying or replevying said judgment, forcibly and unlawfully escaped from the jail; and that he was recaptured by the sheriff of said county, as an escaped prisoner, on the — day of November, 1871, and returned to said jail; and that he now holds him as above.

On exception to this return by the prisoner, it was adjudged sufficient, and the question was reserved.

Voltz, pleading to the return, admitted the recovery of the judgment against him; that failing to pay or replevy the judgment, he was committed to the jail of the county, and to the charge of John W. Hamilton, who was then sheriff of said county; and alleged, that, while in the charge of said Hamilton, as such sheriff, on the 26th of September, 1867, he escaped from the jail of said county, through the negligence of said sheriff, and was never rearrested until the 16th day of November, 1871; and that for the last preceding three years he had been a citizen of the State of Indiana, and a resident of Jefferson county, in said State; that on the 5th day of March, 1868, suit was instituted in the name of the State of Indiana, on the relation of said Louisa Billman, by her next friend, against said Hamilton, as sheriff, to recover the amount of the judgment in favor of said Louisa against him before mentioned; and that she recovered against said Hamilton the sum of six hundred and thirty-one dollars and eighty cents, in full discharge and satisfaction of her judgment against him, and does not now make any claim against him in the proceeding referred to in the return; wherefore, etc. A copy of the judgment against Hamilton is made part of this pleading.

Upon exception to this pleading by Russ, the sheriff, it was adjudged insufficient, and the petitioner excepted. Thereupon he was remanded to the custody of the sheriff. He appeals.

Two errors are assigned; first, the overruling of the ex-

ceptions to the return of the sheriff; and, second, the sustaining the exceptions to the petitioner's reply thereto.

The inquiry, we think, resolves itself into two questions; first, had the plaintiff in the bastardy case the right to have the petitioner rearrested and again put in prison? and, second, if not, had the sheriff the right to rearrest and imprison him, without the concurrence of the plaintiff in that case?

Upon the first question we think the authorities establish the proposition that when a creditor brings an action against the sheriff for the escape of a prisoner in execution, and thereby elects to consider him out of custody, he cannot insist on rearresting the prisoner, or his continuance in custody. *McElroy v. Mancius*, 13 Johns. 121; *Littlefield v. Brown*, 1 Wend. 398; *Rawson v. Turner*, 4 Johns. 469.

The State, on the relation of Louisa Billman, having sued Hamilton, the sheriff, for the escape, and obtained a judgment against him, cannot now insist on the imprisonment of the petitioner. See, also, Crocker Sheriffs, sec. 614.

We are referred by counsel for the sheriff to the case of *Jackson v. Bartlett*, 8 Johns. 361, but that case only decides that after an escape by the defendant from custody on a *ca. sa.*, the plaintiff may proceed against the sheriff for the escape, and at the same time take out a *fieri facias* against the property of the defendant, for the reason, it is said, that the remedies are not inconsistent. This case is not in conflict with the authorities above cited.

The next question is, had Russ the right to arrest and hold the petitioner in custody? We are not referred to any statute or any rule of the common law by which, under the circumstances disclosed in this case, he has any such right. It is enacted that, "if any prisoner confined on civil process shall violently escape from prison, without the connivance of the jailor, and such prisoner shall be recommitted to the prison whence he escaped, within three months next after such escape, such recommitment shall operate to bar any recovery against the sheriff for such escape, except for the

Ex Parte Voltz.

costs of any action that shall have been previously commenced against him therefor." And again, "if judgment in any such action for escape shall have been rendered against the sheriff before the expiration of three months, such recommitment of the prisoner as mentioned in the next preceding section, shall operate as a satisfaction of all such judgment, except the costs." 1 G. & H. 411, secs. 9 and 10.

These sections would seem to give the sheriff a reasonable time in which to recapture the prisoner. In this case, more than four years elapsed before the prisoner was arrested, during three of which he was a resident of the State and of an adjoining county. It was probably the intention of the legislature, in the enactments above quoted, to limit the time within which what is called fresh suit or pursuit may be made by the sheriff. Gwynne Sheriffs, 410; Crocker Sheriffs, secs. 609 and 610.

It seems to be settled that when, in consequence of a negligent escape, the sheriff has to pay the judgment on which the prisoner was committed, he may recover the amount of the prisoner as for money paid. Crocker Sheriffs, sec. 615.

It is provided by statute in this State that when the sheriff, or any surety on his bond, shall be compelled to pay any judgment, or any part thereof, by reason of any default of such officer, except for failing to pay over money collected, or for wasting property levied on, the judgment shall not be discharged by such payment, but shall remain in force for the use of the sheriff or surety making such payment, and, after the plaintiff is paid, so much of the judgment as remains unsatisfied may be prosecuted to execution for his use. 2 G. & H. 309, sec. 676. But this section gives the sheriff or surety no remedy until after the judgment shall have been paid; and then it would be a question whether the right would remain or exist to imprison the defendant, or only to have execution against his property.

When the escape has been voluntary, that is, by the consent of the sheriff, the sheriff cannot recapture the prisoner without new process. Nor, if he is compelled to pay the

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debt, can he, as it appears, recover the amount from the prisoner at common law.

The exception to the reply should have been overruled.

The judgment back to and including the ruling on the exception to the reply of the petitioner is reversed, and the cause remanded for further proceedings in accordance with this opinion.

G. Durbin, for appellant.

W. D. Ward, J. B. Reback, and B. W. Hanna, Attorney General, for the State.

THE STATE v. JONES.

CRIMINAL LAW.—Practice.—Bill of Exceptions.—A bill of exceptions was signed and filed in a criminal case, after the close of the term, without leave having been granted during the term for an extension of time.

Held, that the bill of exceptions formed no part of the record, even if time beyond the term in which to file the bill could have been given.

APPEAL from the Tipton Common Pleas.

WORDEN, C. J.—This was an information against the appellee for assault and battery. The court dismissed the prosecution and discharged the defendant without trial. The State appeals and seeks to reverse the order dismissing the cause and discharging the defendant.

The ground of the action of the court was such as can be made to appear only by a bill of exceptions.

In vacation after the close of the term at which the proceedings were had, a bill of exceptions was signed and filed, setting forth the ground of the action of the court. Time was not given beyond the term, even if it could be in a criminal cause, in which to file a bill of exceptions. The bill of exceptions clearly came too late, and cannot be regarded as a part of the record. The statute provides that "all bills of exceptions in a criminal prosecution must be made out

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and presented to the judge at the time of the trial, or within such time thereafter during the term as the court may allow, signed by the judge and filed by the clerk. The exception must be taken at the time of the decision." 2 G. & H. 420, sec. 120.

The judgment below is affirmed.

J. W. Robinson and B. W. Hanna, Attorney General, for the State.

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37 180
154 371

PLEADING.—Demurrer.—Unsound Mind.—A complaint sought relief from a transaction between the plaintiff and defendant, made when the former was of unsound mind, and there was no averment of a restoration to soundness of mind.

Held, that the court would presume the want of capacity to continue, but that this objection to the complaint would be considered waived unless the want of capacity to sue were presented by demurrer or answer.

APPEAL from the Lagrange Common Pleas.

DOWNEY, J.—Suit by the appellee on a guardian's bond. Wade was the guardian. The security on the bond was not served with process, and consequently does not appear as a party. Nix, as relator, alleges that Wade was appointed his guardian on the 27th day of February, 1866, and that during that month he received three hundred dollars, and afterward the sum of fifty-five dollars, the property of said ward, Nix; that Wade did not, when his ward became twenty-one years of age, nor has he at any time since accounted for and paid over to the relator said sums of money, nor any part thereof; that the relator, when he became twenty-one years of age, demanded of and required the guardian to settle with and pay over to him said sums of money; that before the relator became twenty-one years of age, the defendant fraudulently induced him to purchase of the defendant certain described

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real estate in Lagrange county, Indiana, for the sum of four hundred and fifty dollars, which was twice its value, retaining in his hands the money aforesaid; that Wade had no title to said land, and knew that he could not procure a title to one-third of it; that afterward, and before relator was twenty-one years of age, Wade induced him to trade said land to him for eighty acres of wild land in Iowa, which the relator had never seen, and which was, at the time, delinquent for taxes, and took the relator's note for one hundred and fifty dollars, and a mortgage on the Iowa land as the difference; that after the relator became of age, he requested the defendant to take back the land and pay him his money, which he refused to do, and directed him to sell said Iowa land to Cyrus Wade, minor son of said defendant, which the relator did, and as a consideration therefor received a silver watch worth about fifteen dollars, a pair of skates, and the note of said Cyrus for seven dollars, which defendant purchased of him for five dollars; that the relator was, at the time of all of said transactions, and for a long time prior thereto, a person of weak and unsound mind, and had not mind sufficient to understand and comprehend the nature and effect of the transactions, or to understand and transact ordinary business affairs, which Wade well knew; wherefore, etc.

The defendant answered, first, the general denial; second, payment to the relator after he arrived at majority; third, that on the 15th day of March, 1868, he settled with said relator, and that, too, one year after he arrived at the age of majority, and paid and satisfied said demand in full.

Without any reply, so far as the record shows, there was a trial by the court, finding for the plaintiff, motion for a new trial, on the ground that the finding of the court was not sustained by the evidence and was contrary to law, overruled, and judgment on the finding for the plaintiff.

The assignment of errors is on a detached copy of the answer, certified up after the original transcript was filed, and possibly ought to be disregarded. But we have concluded to overlook the irregularity, as the case was once be-

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fore dismissed because there was no assignment at all. The alleged errors are, first, that the complaint does not state facts sufficient to constitute a cause of action; and, second, that the court erred in refusing to grant a new trial.

In examining the complaint, the first thing that occurs to us is the fact that while it is alleged that the relator was, at the time of the transactions in question, and for a long time prior thereto, a person of weak and unsound mind, etc., he yet sues in his own name as relator. The rule of law requires us, in the absence of any allegation to the contrary, to presume that this unsoundness of mind continues to the present time. Does not the complaint, in alleging this fact, become *felo de se*? After an examination of the sections of the code on the subject of demurring, etc., and particularly section 54, 2 G. & H. 81, we have come to the conclusion that by not raising the question of the plaintiff's want of capacity to sue by demurrer or by answer, the objection is waived, and cannot now be presented for the first time.

The appellant insists that the complaint is insufficient, because it does not sufficiently allege a demand upon the guardian to account and pay over the estate which was in his hands. While it is conceded that there is an allegation of demand, yet it is claimed that it is followed by other matters which qualified and destroyed the effect of it.

The purchase of the land in Indiana, and its exchange for that in Iowa, are both alleged to have taken place while the ward was yet a minor, and was of unsound mind. On account of the infancy, the transactions were voidable by the ward on arriving at majority. *Sherry v. Sansberry*, 3 Ind. 320. And, on account of the insanity, they were voidable if not void. 2 G. & H. 575, sec. 11; *Crouse v. Holman*, 19 Ind. 30. We are inclined to hold the allegation of a demand made after the ward arrived at majority as sufficient. If he was insane, he could not reconvey the land to his guardian. If the making of a deed was necessary and possible, we think it may with great propriety be held that the conveyance of the land to the minor son of the defendant, by the defend-

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ant's direction, was sufficient. The conceded facts of the case appeal to the court very strongly in favor of the plaintiff. He was, as alleged in the complaint, entitled to receive from the defendant three hundred and fifty-five dollars. After their trades, two of which are alleged to have been made while he was yet a minor, and the other by direction of the defendant, he comes out with a fifteen dollar silver watch, five dollars in money, and a pair of skates, with his note and mortgage for one hundred and fifty dollars outstanding. Such a result ought to be presumed to be the offspring of deceit and fraud. We hold the complaint sufficient.

The only other question is as to the correctness of the ruling of the court in refusing to grant a new trial on the motion of the defendant. The finding and judgment were for two hundred and fifty dollars. We have read the evidence. It tends very strongly to show the weakness of mind of the relator and his incapacity for business. As to his infancy it is conflicting. We cannot reverse the judgment on account of the insufficiency of the evidence.

Per Curiam.—The judgment is affirmed, with ten per cent. damages and costs.

J. B. Wade and *J. B. Black*, for appellant.

A. B. Kennedy, for appellee.

HUGHES v. HUGHES.

WILL.—Subsequent Issue.—Revocation.—The birth of a child of a testator, after the execution of the will, works an entire revocation of the will, unless provision shall have been made in such will for such issue.

APPEAL from the Jasper Common Pleas.

BUSKIRK, J.—This was a petition filed by the appellee against the appellant to revoke the probate and set aside the will of Levi Hughes, deceased. The petition alleges that the defendant was the widow, and the plaintiff, and three

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sisters, and three brothers were the only children and heirs of Levi Hughes, who died at Remington, in said county, November 6th, 1870, testate, the owner of real estate therein; that by the will of the said decedent, the testator devised all the rest and residue of his estate, real and personal, after the payment of debts and charges, to his widow, to be to her and her heirs forever; that after the execution of the will there was issue of the marriage four children, and before its execution there had been issue three children, all of whom were living; that the youngest child was about six years old at the death of the testator; that there are no debts against the estate of the said decedent; that the will was revoked for the reason that no provision was made by the will for the children born after its date; and that this was an amicable suit to obtain the determination of a question of law arising upon the will. A copy of the will was filed with the complaint. The will was executed June 5th, 1855, and admitted to probate the 15th day of February, 1871.

The appellant appeared to the action, and filed a demurrer to the petition, upon the ground that the same did not state facts sufficient to constitute a cause of action.

The court overruled the demurrer, and the appellant excepted, and declining to answer over, the court adjudged the will invalid, for the reason that children had been born subsequent to its execution, for whom no provision was made in the will, and revoked the probate of the will.

The only question presented for our decision is, whether the court erred in overruling the demurrer to the petition.

The third section of the statute of wills reads as follows:

“Sec. 3. If after the making of a will, the testator shall have born to him legitimate issue who shall survive him, or shall have posthumous issue, then such will shall be deemed revoked, unless provision shall have been made in such will for such issue.” 2 G. & H. 552.

The above section of the statute is so plain and unequivocal as to leave little room for doubt or construction. The

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object of the statute was to render certain and definite what had become uncertain and doubtful by reason of the conflicting decisions of the courts in England and this country. The ecclesiastical courts very early adopted the rule, that marriage and the birth of a child revoked a will as to personalty, and the same principle was ultimately, but not without a struggle, applied to devises of real estate. Finally, it was held that it was not necessary that a subsequent marriage and birth of a child should both concur, but that the birth of a child alone, in connection with other circumstances, might be sufficient to raise an implied revocation. In some of the cases it was held that the subsequent birth of a child only revoked the will as to such child, while in others it was held that it was not necessary that the provision for the subsequent issue should be made in the will, but that it might be made otherwise. The most, if not all, of the American states have adopted statutes on the subject, but these statutes are as different and conflicting as had been the decisions of the courts. The precise question involved in this case has been decided in Ohio and Illinois, where it was held, under statutes similar to ours, that the birth of a child subsequent to the execution of a will worked an entire revocation of the will. *Evans v. Anderson*, 15 Ohio St. 324; *Tyler v. Tyler*, 19 Ill. 151.

The whole question is now regulated by statute in England.

Under our statute, the birth of a child, after the execution of a will, works an entire revocation of the will, unless provision shall have been made in such will for such issue. Such is the plain, express, and undoubted requirement of the statute, and it is our imperative duty to carry into execution the legislative intention.

We are of the opinion that the court committed no error in overruling the demurrer.

The judgment is affirmed, with costs.

D. H. Maxwell, for appellant.

B. E. Rhoads, for appellee.

Noble v. Leary.

NOBLE v. LEARY.

ATTORNEY.—*Set-off.*—*Agency.*—An attorney, when sued for money collected for the plaintiff, may set off a note held by him, executed by the plaintiff. There is nothing in the doctrine of agency that forbids such a defence.

APPEAL from the Marion Common Pleas.

.DOWNEY, J.—This action was set on foot by the appellee against the appellant. It is alleged in the complaint that the defendant was a claim agent, and as such he undertook to collect a balance of pay for one John Maloney from the United States, for a designated sum as compensation, to be deducted from the money when collected; that the defendant under this employment collected the sum of four hundred and ten dollars and forty-one cents; that afterward Maloney demanded the money of him, less the amount of his compensation, which he refused, and still refuses to pay; that Maloney assigned the claim to the plaintiff, who also demanded the money of the defendant, when he again refused to pay.

The defendant answered, by way of set-off, that the plaintiff's assignor was indebted to him in the sum of two hundred and eighty-eight dollars and fifteen cents, with interest from August 2d, 1866, on a promissory note of that date, at three months, made by Maloney to third persons named, and by them indorsed to him, before notice to him of the assignment by Maloney to the plaintiff of the cause of action on which the suit is brought; and, also, in the sum of forty-two dollars for the services mentioned in the complaint. The defendant proposed to set off these amounts against so much of the plaintiff's demand, and offered to confess judgment for the residue of the plaintiff's claim.

A demurrer to this answer, alleging that it did not state facts sufficient to constitute a defence, was sustained by the court. The defendant excepted, and, abiding by his demurrer, final judgment was rendered against him.

The error assigned is the sustaining of the demurrer to the answer.

The ground assumed by counsel for the appellee in support of the ruling of the court is, that on account of the existence of the relation of principal and agent between Maloney and Noble, Noble could not purchase the note against Maloney and use it as a set-off in the action for the recovery, by the plaintiff, from him, of the money collected and received by means of the agency. He deduces this principle from the rule that the agent cannot place himself in a position adverse, or in opposition to the interest of the principal. No authority on the exact point involved is cited by counsel for either party. We have not found, in a limited search for authority, any case exactly like this. Recurring, however, to the works on the subject of agency, we find the rule referred to by counsel for the appellee to be this, "that, in matters touching the agency, agents cannot act, so as to bind their principals, where they have an adverse interest." Story Agency, sec. 210. The purchase of the note in this case, which the defendant sought to use as a set-off, was, so far as we can see, in no way connected with the agency. Had it been shown, by a reply to the answer, that the defendant, by the use of the money of his principal, had purchased the note at a discount, it is probable that he could receive credit only for the amount paid by him. Story Agency, secs. 207 and 214; Dunlap's Paley Agency, 49. But this question is not before us.

We see no reason why, if the defendant had sued Maloney on the note which he purchased and held against him, Maloney could not have met the claim by an answer of set-off on account of the liability of the defendant to him for the money collected. Nor can we, on the other hand, see any legal reason why, when Maloney or his assignee sues the defendant for the money collected, he cannot use the note as a set-off, to that extent, against the demand for the money. The statutory provision regarding a set-off is this; "the set-off shall be allowed only in actions for money de-

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mands upon contract, and must consist of matter arising out of a debt, duty, or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured at or before the time it is offered as a set-off." 2 G. & H. 88, sec. 57.

It is not claimed by counsel for the appellee that there is anything in the nature of this particular agency which requires it to be distinguished from any other agency; but it is insisted that the rule contended for applies to all agencies where it is the duty of the agent to account for money received by him for his principal. Could it be successfully asserted that the defendant could not have sued Maloney on the note, even while he yet held the money collected for him in his hands? We think not.

It is our opinion that the set-off should have been allowed. The judgment is reversed, with costs.*

A. G. Porter, B. Harrison, and W. P. Fishback, for appellant.

W. R. Manlove, for appellee.

*Petition for a rehearing overruled.

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138 173

MECHANIC'S LIEN.—Action.—Necessary Parties.—In a suit to enforce a mechanic's lien for the material furnished and labor performed in the erection of a building, where, subsequent to the contract for the work, the owner of the land has sold and conveyed it, he is not a necessary party.

SAME.—Priority over Conveyances.—The lien of the mechanic relates to the time when the work commenced or the material began to be furnished, and takes priority as well over subsequent conveyances as over subsequent incumbrances.

APPEAL from the Wayne Common Pleas.

BUSKIRK, J.—This was a proceeding on the part of the appellees against appellant and Reuben Taylor, to enforce liens against certain described real estate, for materials furnished and labor performed in the erection of a house thereon.

There was issue, trial by the court, motion for a new trial overruled, and judgment.

Numerous errors have been assigned, but none of them can be considered, except the action of the court in overruling the demurrer to the complaint, and in sustaining it to the second and third paragraphs of the answer of Kellenberger and Taylor.

There is copied into the record what was evidently intended to be a special finding of the court, but it is not signed by the judge or made a part of the record by a bill of exceptions; nor was there any exception to the decision of the court, or any motion made in reference thereto. No error can be assigned thereon.

The appellant has assigned for error the overruling of the motion for a new trial, but the evidence is not in the record, and, consequently, no question is presented for our decision on such ruling. It is also assigned for error that the judgment is informal, uncertain, and defective, but no motion was made to correct or set it aside, or any objection taken to it in the court below, and no question can be presented in this court in reference thereto. *Smith v. Dodds*, 35 Ind. 452, and *Train v. Gridley*, 36 Ind. 241.

This leaves for our decision the correctness of the rulings of the court on the demurrers to the complaint and the answer.

The complaint charges, that George H. Oakes, being then seized in fee of certain real estate therein described, contracted with the plaintiffs below to furnish materials and perform labor, in and about the construction of a dwelling-house on said real estate; that the work and labor was commenced October 15th, 1861, and completed January 14th, 1869; that on the 6th day of November, 1868, Oakes sold and conveyed the said real estate; that Taylor claimed to have some interest in said real estate; that the plaintiffs filed their notice of the lien February 9th, 1869. The action was commenced to foreclose the lien March 17th, 1869. Oakes, Kellenberger, Taylor, and other lien holders were made defendants, all of whom were served and appeared but Oakes.

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The demurrer pointed out two grounds of objection to the complaint; first, that Oakes was not a party defendant; second, that the complaint did not state facts sufficient. The demurrer was overruled, and an exception was taken.

Was Oakes a necessary party defendant? This was a proceeding to enforce a mechanic's lien on real estate and obtain a decree for the sale of the premises to satisfy the liens thereon. There was no personal judgment demanded or rendered. This proceeding assimilates itself to the foreclosure of a mortgage.

In *Stevens v. Campbell*, 21 Ind. 471, it was held by this court that, when the mortgagor, subsequent to the execution of the mortgage, had sold and conveyed the mortgaged premises, he was not a necessary party to a proceeding to foreclose the mortgage against the purchaser, when no personal judgment was demanded.

The same principle is applicable to this case. The making of Oakes a party was not necessary to the enforcement of the rights of those who had liens on the property. Their proceedings were against the property, and not against Oakes. Nor would his being a party avail Kellenberger; for his remedy, if any, is on the covenants of warranty in the deed from Oakes to him.

This ground of demurrer was not well taken. Nor do we think there was anything in the second ground of objection. We think the facts stated were sufficient to entitle the plaintiffs to the relief prayed for. The court committed no error in overruling the demurrer to the complaint.

The second paragraph of the answer was as follows.

"And for second answer they say that prior to the filing of the notices by the plaintiffs of their intention to hold liens on said property in the complaint mentioned in the recorder's office, the said defendant, without any knowledge of the existence of said liens, purchased of the said Oakes and wife, for a valuable consideration, the real estate in the complaint described; and that the said Oakes and wife, on the 9th day of November, 1869, executed and delivered to him, the

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said Kellenberger, a deed of conveyance therefor, which deed was duly recorded in the office of the recorder of Wayne county, according to law, and that afterward, to wit, on the — day of —, 1869, said Kellenberger sold and conveyed said property to defendant Taylor, by deed of conveyance, duly recorded, and for a valuable consideration, and the defendant Taylor is now the owner thereof; and the defendants say further, that the work and labor done and the materials furnished, in the complaint mentioned, were not done and furnished for said defendants, Kellenberger and Taylor, nor at their instance and request."

The third paragraph was the same as the second, except it was alleged that "prior to making said purchase, said defendant Kellenberger made diligent examination and inquiry in regard to incumbrances and liens on said property, and found that none existed of record;" and that, "subsequent to said conveyance to the defendant Kellenberger no work had been done, or materials furnished, for said building in complaint mentioned."

Did the facts stated in the second and third paragraphs of the answer, or in either of them, constitute a valid defence? The solution of that question will depend upon the time when the mechanic's lien attached on the property in controversy. If the lien attached at the time when the work on the building commenced, then it will constitute a prior lien, and the appellant took the conveyance subject to the prior incumbrance. If, on the other hand, the lien did not attach until the notice was filed in the recorder's office, then the lien would be subsequent to the conveyance, and a purchaser in good faith, and for a valuable consideration, would hold the property free from such subsequent lien.

Under the act of June 18th, 1852, this court, in *Millikin v. Armstrong*, 17 Ind. 456, held that the lien of a mechanic, for work done or materials furnished in the construction of a house, only took effect from the time of filing his notice in the recorder's office.

By the act of March 11th, 1867, the act of 1852 is so

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amended as to provide that "liens so created shall relate to the time when the work upon said building or repairs began, and to the time when the person furnishing materials began to furnish the same, and shall have priority over all liens suffered or created thereafter, except other mechanics' and material men's liens, over which there shall be no such priority." Acts of 1867, p. 98.

A construction has been placed upon the act of 1867 by this court, in *Fleming v. Bumgarner*, 29 Ind. 424, where it is said: "It is contended that the liens do not take priority over the subsequent conveyance, but that, by the terms of the law, the priority is confined to subsequent liens, and does not embrace conveyances. We think otherwise. A fair construction of the law is, that the lien of the mechanic or material man relates to the time when the work commenced, or the materials began to be furnished, as to subsequent conveyances as well as to other liens. Fleming took his conveyance subject to the liens of the appellees."

The above decision is directly in point, and if the construction placed upon the act of 1867 is approved, it must be decisive of the case under consideration. The above construction is not justified by the "terms of the law," for, by such terms, the act is limited to incumbrances, but is made to embrace conveyances. We have, after much reflection, and with considerable hesitation, come to the conclusion that the above construction does not extend the operation of the act beyond its evident spirit and the legislative intention.

A recent elementary writer says: "A subsequent transfer of the property ought and does not affect the lien after work has actually been begun." Houck Liens, 146.

To the same effect are the following cases: *Hotaling v. Cronise*, 2 Cal. 60; *Miller v. Barroll*, 14 Md. 173; *Knox v. Starks*, 4 Minn. 20; *American Fire Insurance Co. v. Pringle*, 2 Serg. & R. 138.

It is also said by Houck, 145, that "the office of a lien is not to create an estate, nor, in the slightest degree, to affect or interfere with prior incumbrances, but to prevent subse-

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quent alienations or incumbrances to defeat a just demand."

We are of the opinion that the court committed no error in sustaining the demurrer to the second and third paragraphs of the answer of appellant and Taylor.

We avail ourselves of this opportunity of suggesting to the clerk of Wayne county, and through him to the other clerks of the State, that, while it may be a source of profit to him to cover thirteen pages of the record in this case with summonses and the returns thereon, when all the parties served appeared to the action, it is in violation of the plain and undoubted requirements of the law, and his sworn duty, and imposed unnecessary expense upon the appellant, and great labor upon the judges of this court. We commend to his careful examination, sections 558 and 559 of the code, and we more especially invite his attention to the last clause in section 559.

The judgment is affirmed, with costs.

W. C. Wilson, for appellant.

L. D. Stubbs, for appellees.

 GRASS v. HESS ET AL.

JUDGMENT.—*Injunction*.—Where a resident of this State is sued out of his county before a justice of the peace, and process by summons is served upon him, and judgment is rendered against him without an appearance, an injunction will lie to stay proceedings under the judgment.

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136	110
37	193
140	162
37	193
149	559

APPEAL from the Cass Circuit Court.

DOWNEY, J.—The appellant, being a resident of Cass county, was sued by Hess before a justice of the peace of Wabash county, and process by summons was there served on him. On the return day of the summons he failed to appear before the justice of the peace, and judgment was rendered against him by default. A transcript of this judg-

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ment was taken, filed, and recorded in the office of the clerk of the common pleas of Cass county, and an execution issued on it to the sheriff of that county, who was about to levy the same on the property of Grass, when he filed the complaint in this case to enjoin the sheriff from making such levy.

There was a demurrer to the complaint sustained, and this is the error complained of.

The law on this subject seems to be settled by the decisions of this court against the ruling of the circuit court. The case of *Brickley v. Heilbruner*, 7 Ind. 488, involved the point in question here, and it was there held that the injunction was a proper remedy. The court held, in that case, that the defendant, when served with process to appear out of his own township, need not appear and make the objection before the justice of the peace. In *Gage v. Clark*, 22 Ind. 163, though the court decided the case against the applicant for the injunction on account of the imperfections in his papers, it is clearly to be understood that when the judgment is rendered without appearance and consent of the defendant, when the suit is in the wrong township, injunctive relief will be granted.

If the justice of the peace has jurisdiction of the subject-matter of the action, and the defendant appears in answer to process and contests the case on the merits, instead of pleading in abatement, under oath, to the jurisdiction of the court over his person, he is estopped from making that issue in the appellate court. *Ludwick v. Beckamire*, 15 Ind. 198.

The judgment is reversed, with costs, and the cause remanded, with instructions to the circuit court to overrule the demurrer to the complaint, and for further proceedings.

W. H. Smith, for appellant.

A. Hess, for appellees.

MOREAU ET UX. v. BRANSON.

PROMISSORY NOTE.—*Copy of Indorsement.*—A complaint on a promissory note against the indorsers is not sufficient without a copy of the indorsement, which is the foundation of the action.

MARRIED WOMEN.—*Indorsement of Note.*—A married woman may, with the consent of her husband, transfer her title to a promissory note, and for that purpose may indorse such note, but she cannot bind herself by the contract to a liability on the note.

APPEAL from the Hancock Common Pleas.

WORDEN, C. J.—This was an action by the appellee against the appellants, upon an indorsement by the defendants to the plaintiff of two promissory notes, executed by one Robert Allison to defendant Minnie Moreau. A copy of the notes is set out, but no copy of the indorsements. The notes bore date November 13th, 1867, and are due at six months. This suit was commenced August 26th, 1868.

It is not averred that any action has been brought against the maker of the notes, but it is averred "that said Robert Allison now is, and long has been, notoriously insolvent, and that he has no property subject to execution whereof he can collect this claim; that the said defendants have often requested him, the plaintiff, not to bring suit upon said notes, as they would pay the same; wherefore he has not brought suit upon the same sooner."

The defendants demurred to the complaint, for the want of a statement of facts sufficient, etc., but the demurrer was overruled, and the defendants excepted.

The defendants answered jointly by the general denial; and each answered separately in one paragraph, to each of which a demurrer was sustained, and they severally excepted. We do not understand from the brief of counsel for appellants that they complain of error in the ruling upon the demurrer to the separate answer of Will C. Moreau; therefore no further notice need be taken of it.

Minnie's answer alleged that, at the time the notes were executed to her, and at the time she indorsed the same to

Moreau *et ux.* v. Branson.

the plaintiff, she was, and still is, a married woman, the wife of her co-defendant.

Trial by the court; finding and judgment for the plaintiff.

We are of opinion that the complaint was bad, and that the demurrer thereto should have been sustained.

The indorsements of the notes constituted the foundation of the action. They were the contracts sued upon; and in such case they should be set out by original or copy. *Treadway v. Cobb*, 18 Ind. 36; *Seawright v. Coffman*, 24 Ind. 414.

Again, the averments of the complaint seem to be insufficient to excuse a want of diligence to collect of the maker. For aught that appears in the complaint, Allison, the maker of the notes, may have had property at or after the maturity thereof, out of which they could have been collected, had suit therefor been prosecuted with diligence. The averments as to his insolvency and want of property are confined to the time of the institution of this suit, more than three months after the maturity of the notes; except that it is averred that he had long been notoriously insolvent. A "long" time is so indefinite a period of time, that the statement adds little, if anything, to the other averments. This objection to the complaint, however, need not be passed upon, as it will have to be held bad, on the ground above stated; and when the cause goes back, such amendments can be made as may be desirable.

We are also of the opinion that the separate answer of Mrs. Moreau was a good bar to the action as against her; and, therefore, that the demurrer thereto should have been overruled. It may be observed that there is nothing in the complaint charging that by the contract of indorsement she undertook to bind or create a charge upon her separate estate, or, indeed, that she had any such estate; even if by such contract she could bind her separate estate. The form of the complaint was not such that anything but a personal judgment could be rendered thereon.

As a general rule, a married woman is incapable, in law, of making a contract. To this rule there are exceptions; as

she may make some contracts in reference to her separate estate, which will create a charge thereon. See the cases of *Kantrowitz v. Prather*, 31 Ind. 92, and *Lindley v. Cross*, 31 Ind. 106, where questions of this character are ably and thoroughly considered. See, also, *Hasheagen v. Specker*, 36 Ind. 413.

Again, a married woman may, with the consent of her husband, make a contract for the sale of her personal property. We mean an executed contract; one by which the title passes to the purchaser. Whether she could make an executory contract that would bind either her or the property, we need not decide.

This power to sell with the consent of the husband arises from the statute, which secures her personal property to her "to the same extent, and under the same rules," as her real estate; and as she may convey her real estate with the consent of her husband, so, therefore, may she her personal estate. A promissory note is personal property, which a married woman may sell with the consent of her husband. *Reese v. Cochran*, 10 Ind. 195; *Scott v. Scott*, 13 Ind. 225; *Collier v. Connelly*, 15 Ind. 141. As she may sell a promissory note, she may do every thing that is necessary to vest the title, legal as well as equitable, in the purchaser; and, hence, for the purpose of transferring the title, she may indorse the note. Her husband need not indorse with her, as his assent may be otherwise manifested. *Collier v. Connelly*, *supra*.

But a married woman cannot bind herself by any covenants in a deed which she may make; nor can she bind herself by any indorsement of a promissory note, beyond the vesting of the title in the purchaser. Her indorsement vests in the indorsee whatever title she had; and further than this, she is not authorized, either by the common law or statute, to bind herself by indorsement. She is not liable to the indorsee upon the dishonor of the note. Her indorsement, which can only be made for the purpose of transferring the paper, carries with it none of the warranties that attach to

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indorsements when made by persons laboring under no disabilities.

The judgment below is reversed, with costs.

W. R. Pierse; H. D. Thompson, C. Butler, J. L. Mason, and C. G. Offutt, for appellants.

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142 519

THE STATE, EX REL. COMBS, *v.* HUDSON.

PLEADING.—Former Adjudication.—A plea of former adjudication, showing that the questions, things, rights, and matters in suit have been adjudged and tried before and by a tribunal of competent jurisdiction, is good on demurrer.

SAME.—Jurisdiction of the Person.—Where the record upon which a plea of former adjudication is based, showing judgment against the defendant by default, only shows service of process on him by recitals in the record, without containing a copy of the notice and return of service, it may be shown that no jurisdiction of the person of the defendant was acquired by proper service.

CONTEST OF ELECTION.—Notice of Contest.—In proceedings for the contest of an election to a county office, a copy of the statement of contest and notice must be served by the sheriff by delivering to the contestee a copy of the notice and statement of contest, or by leaving a copy thereof at his last usual place of residence.

SAME.—Return of Service.—A return upon the notice issued in such case, as follows: "Served on the within named" A. B., "by reading and delivering to him a copy of the order," is insufficient to show the service required by the statute.

APPEAL from the Green Circuit Court.

PETTIT, J.—This is an information in the name of the State, on the relation of John J. Combs, against John R. Hudson. The object of the proceeding is to inquire by what authority the defendant holds and exercises the office of county commissioner in the county of Green. The information charges that John R. Hudson, on the 6th day of September, 1869, did wrongfully and unlawfully intrude into the office of county commissioner, of the county of Green, in the

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said State; that he had continued, from that time to the filing of the information, to hold and discharge the duties of the said office; that the holding and discharging the duties of the said office by the said Hudson was wrongful and unlawful, for the reason that he had not been duly elected to the said office, and was not entitled to hold and exercise the duties of such office; that the relator had been damaged in the sum of five hundred dollars by the wrongful and unlawful conduct of the said Hudson, by reason of the fact that the relator had been duly and legally elected to the said office. The prayer of the information was, that the said Hudson be notified to appear and show by what authority he held and executed the said office.

The defendant appeared, and answered in three paragraphs.

The relator demurred to the second and third paragraphs of the answer. Demurrer sustained.

The defendant excepted to this ruling.

The substance of the third paragraph of the answer is, that within ten days after the relator was declared elected, the appellee gave notice of contest, and filed a statement, which set out, in detail, the causes of contest; that, upon filing such statement, the auditor gave notice to the clerk, and called the board of commissioners together; that notice was issued and served on contestee of the time and place of trial, and that he had notice of the matter and questions to be tried; that the board of commissioners met at the time and place designated by the auditor; that the relator was called and defaulted and failed to attend, and the court proceeded to hear the proof; that the case was tried on its merits and found for the appellee, and that he was duly commissioned, and had been acting under such commission. The record of that proceeding was made a part of this paragraph.

The first entry made by the board of commissioners in that case is in these words:

"Trial being called, comes now the said John R. Hudson, contestor, by Rose and Alexander, his attorneys, and proves,

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to the satisfaction of the court, that a notice of the time and place specified in the notice to the board of commissioners, for trying said contest of election, for the office of commissioner of Green county, Indiana, had been duly served on John J. Combs, contestee, as aforesaid, by the sheriff of said county, and a copy of the specifications filed in the said cause had been duly delivered to the said contestee, by the sheriff aforesaid, within five days after the said notice and specifications had been delivered to the said sheriff, and being now three times called, comes not, but makes default herein."

The plaintiff filed a reply to the third paragraph of answer in these words:

"And the said plaintiff, for a reply to the third paragraph of the answer, says, that he ought not to be estopped or precluded by the matters and things alleged in the said third paragraph of the answer, for the reason that the proceedings and judgment of the said board of commissioners were illegal and void, for the reason that the said board of commissioners had no jurisdiction of the said cause, or the person of the defendant in that action and the plaintiff in this action, because the said contestee in the said proceedings had not been notified of the pending of such proceedings in the manner required by the statute, as will more fully appear by reference to the notice issued by the auditor, and delivered to the sheriff of the said county, and his return thereon, copies of which are filed herewith, and hereof made a part, which notice and the return thereon are in the words and figures as follows, to wit:

'STATE OF INDIANA, GREEN COUNTY, SS:

'The State of Indiana to the Sheriff of Green county, greeting:

'You are hereby commanded to summon John J. Combs to appear before the board of commissioners of said county, on the 7th day of November, 1868, at the court house in Bloomfield, to answer in a case of contested election for county commissioner, first district, wherein John R. Hudson

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is contestor, and John J. Combs is contestee. Herein fail not, and have then and there this writ.

‘Witness my hand and official seal this 21st day of October, 1868.

[Seal]

O. T. BAKER,

‘Auditor Green county.’

“Which writ has the following sheriff’s return on it:

‘Served on the within named John J. Combs, by reading and delivering to him a copy of the order, dated this 23d day of October, 1868.

F. M. DUGGER, Sheriff.

‘By JAMES HARRAH, Deputy.’

“That the finding of the said board of commissioners, that the defendant in that proceeding ‘had been duly served with notice,’ was untrue in fact, and not sustained by the return of the sheriff on the said notice.”

The defendant demurred to this reply. The demurrer was sustained, exception taken, and the plaintiff refused to reply further. The court rendered final judgment in favor of the defendant, and plaintiff prayed an appeal to the Supreme Court, which was granted.

The errors assigned and argued are, first, that the court erred in overruling the demurrer to the third paragraph of the answer; second, the court erred in sustaining the demurrer to the second paragraph of the reply, which was a reply to the third paragraph of the answer. We have no doubt that the third paragraph of the answer was good, as it showed that the questions, things, rights, and matters set up in this suit had before been adjudged and tried before and by a tribunal of competent jurisdiction.

The board of commissioners had jurisdiction of the subject-matter. The subject-matter was the contest of elections. 1 G. & H. 316.

The next and only remaining question is, was the reply sufficient? The notice to the contestee and the return of the sheriff were not made a part of the third paragraph of the answer, nor were they set out in the record accompanying and made a part of it; but the record recites that it was

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"proved to the satisfaction of the court that a notice of the time and place specified in the notice to the board of commissioners for trying said contest of election for the office of commissioner of Green county, Indiana, had been duly served on John J. Combs, contestee as aforesaid, by the sheriff of said county, and a copy of the specifications filed in said cause had been duly delivered to the said contestee by the sheriff aforesaid," within the proper time. The reply seeks to avoid the force of the estoppel pleaded, by averring that notice had not thus been given, and that for that reason the court had no jurisdiction of his person, and makes the notice and return of the sheriff a part of it. The form of the notice is not objected to, but the objection goes to the return of the sheriff thereon, which is as follows: "Served on the within named John J. Combs by reading and delivering to him a copy of the order." Sec. 18, 1 G. & H. 319, requires that the notice and a copy of the statement of contest shall be delivered to the sheriff, who shall serve the same on the contestee "by delivering to him a copy of such notice and statement, or leaving a copy thereof at his last usual place of residence." The statutory notice must be given, or the commissioners could have no jurisdiction of the person; and it is competent to controvert this service, especially when it is only shown by recitals in the record, and not by an inserted or recorded copy of the notice and return. The sheriff does not say that he delivered a copy of the notice or of the statement, but that he served the notice by reading, and delivered a copy of the order.

What is intended by the order, we cannot say; but it is manifest that no order, a copy of which could be delivered, had been made, for the commissioners had not then met to make any order. The reply shows that the service was not such as the statute requires, and that the board of commissioners had acquired no jurisdiction of the defendant. *Horner v. Doe*, 1 Ind. 130; *Woodhull v. Freeman*, 21 Ind. 229; *Doty v. Brown*, 4 Comst. 71; *Packet Company v. Sickles*, 5 Wal. 580.

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The court should have overruled the demurrer to the reply, and allowed both parties to prove what was the actual service made.

The judgment is reversed, at the costs of the appellee, with instructions to overrule the demurrer to the second paragraph of the reply to the third paragraph of the answer.

BUSKIRK, J., having been of counsel, was absent.

S. H. Buskirk and *J. R. Isenhower*, for appellant.

● MCNIEL ET AL. v. FARNEMAN, TREASURER.

PRACTICE.—*Motion for New Trial*.—A motion for a new trial must be made at the term at which the verdict is rendered, unless for a cause occurring afterward.

TAXES.—*Lien*.—*Levy of Execution*.—When the treasurer of a county acquires a lien for taxes on personal property, by the duplicate coming into his hands, his lien is superior to an execution subsequently levied.

APPEAL from the Carroll Circuit Court.

DOWNEY, J.—This was an action to recover the possession of certain personal property, commenced by the appellee, as treasurer of Carroll county, against McNiel, who was a constable, and certain others. The material question in the case grew out of the facts that McNiel, as constable, by virtue of certain executions in his hands, issued by a justice of the peace, had levied on the property in question, and the treasurer, by virtue of his tax duplicate and precept, also seized the same property for taxes due from the execution defendants; and the question was, which was the paramount lien on the property.

The issues formed were tried by the court, and there was a finding that the defendant, the constable, was entitled to the possession of the property; and it was ordered to be returned to him, "subject to a paramount lien of five hundred and ninety-five dollars, held by the plaintiff, Isaac Farneman, treasurer," etc. At the next term after that at which the de-

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cision was made, but before judgment was rendered, the defendants asked leave to move for a new trial, to which plaintiff objected, and which the court refused to grant. No written reasons therefor appear in the record. Thereupon the defendants moved the court to arrest that part of the judgment relating to the paramount lien, which motion was also overruled. The ground of this motion is not disclosed.

We are at a loss to know exactly what questions, if any, are presented to us by the record and assignment of errors.

The first error alleged is, that the court erred in finding that the appellee had and held a paramount lien on the property mentioned in the complaint.

Now, since the evidence is not in the record, we do not see how we can say anything about the correctness of the finding.

The second error assigned is, that the court erred in rendering judgment for the appellants for a return of the property mentioned in the complaint of appellee, subject to a lien of appellee. Whether the rendition of the judgment was correct or not, depended upon the finding. If the court found the lien to exist, it was right to declare it in the judgment.

The third error complained of is, that the court erred in refusing to allow the appellants to file a motion for a new trial. There was no error in this. The motion, except for causes discovered after the term, must be made at the term at which the verdict or decision is rendered. 2 G & H. 215, secs. 354, 356. We must presume that the leave was properly refused, as nothing to the contrary is shown. It does not appear that the causes for a new trial were discovered after the term at which the decision was rendered.

The fourth and last error alleged is, that the court erred in overruling the motion to arrest the judgment, on that portion of the finding as to a paramount lien of the appellee. This presents a new question; that is, whether a party can move in arrest of judgment as to that part of the verdict or finding which is against him, and not as to the whole of it.

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But passing over this question, let us inquire as to the law of the case. The complaint alleges that the plaintiff "is entitled to the possession of the property, by virtue of having levied upon the same for taxes due said county and State, of which the defendant, McNiel, constable, has possession without right, and which he unlawfully detains from the plaintiff." The answer was, first, a general denial; and, second, that at the time of the commencement of the suit, McNiel was constable, and had in his hands executions, and that he levied the same on the property in question and took possession thereof, long before the plaintiff levied upon or seized the same, and that at that time the execution defendants had other property out of which the taxes could have been made. There was a general denial of the second paragraph of the answer.

Might the court under these issues have found that the treasurer had, by virtue of his duplicate and seizure, or by virtue of the duplicate alone, such lien? We think so. If so, then we can see no ground for the motion in arrest of that part of the judgment relating to the lien. If the treasurer acquired a lien on the property from the time when the duplicate came to his hands, as seems to be the case, *Barker v. Morton*, 19 Ind. 146, this lien would not be divested in favor of an execution subsequently issued and levied. *Veit v. Graff*, *post*, p. 253, and *Evans v. Bradford*, 35 Ind. 527. The lien of a junior execution first levied, where they are in the hands of different officers, takes precedence over an older one levied afterward, or not levied at all; but this rule cannot apply as to liens for taxes. 2 G & H. 232, sec. 413. Why the court found that the constable had the right to the possession of the property, while the county treasurer had the paramount lien, we do not quite see. But the appellants are not complaining, and cannot complain of this part of the judgment.

The judgment is affirmed, with costs.

B. B. Daily, and *D. B. Graham*, for appellants.

L. E. McReynolds, for appellee.

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APPEAL.—*License to sell Intoxicating Liquors.*—Where an appeal has been taken to the circuit court or court of common pleas from the action of a board of county commissioners in granting or refusing license to sell intoxicating liquors, the decision of such appellate court is final.

APPEAL from the Montgomery Circuit Court.

WORDEN, C. J.—Andrew J. Porter petitioned the board of commissioners of Montgomery county for a license to sell intoxicating liquors. John S. Brown and others remonstrated. The board, on a hearing of the cause, granted the license.

The remonstrants appealed to the circuit court, where the appeal was dismissed because the remonstrants were not shown, in the remonstrance, to have been inhabitants of the township in which the liquors were proposed to be sold; leave to amend the remonstrance in this particular being refused. The remonstrants appeal to this court.

The second section of the act of 1861, on this subject, 3 Ind. Stat. 330, provides, that "either party to such appeal to the circuit court or court of common pleas may demand, and have a trial by jury in said circuit court or court of common pleas, and the decision or verdict of such jury shall be final and conclusive, and without appeal therefrom."

In the case of *The Board of Commissioners of Parke County v. Lease*, 22 Ind. 261, it was held, that, under this statute, no appeal lies to this court. We adhere to that decision. See, also, *The State v. Vierling*, 33 Ind. 99. The language of the statute is a little ambiguous, but we think it was the intention of the legislature that no appeal should lie to this court in such cases. Perhaps the reason was that the time of this court should not be consumed in the decision of controversies of such character.

The appeal is dismissed, with costs.

P. S. Kennedy and R. B. F. Peirce, for appellants.

Reinskopf *et al.* v. Rogge *et al.*

REINSKOPF ET AL. v. ROGGE ET AL.

CONTRACT.—*Intoxication.*—*Ratification.*—In a suit upon a mortgage, it is a good defence, that the defendant was so intoxicated, at the time of signing the same, as to be incapable of executing it; and a reply that he retained the goods for which the instrument was given, and used them, is bad, as the action is not on a claim for goods sold but on the written promise, and the reply shows no ratification of that act.

SAME.—*Instruction.*—In such case, an instruction to the jury, that “if the defendant, at the time of the execution of the mortgage, as a result of drunkenness, or any other diseased condition of the mind, was deprived of his understanding, so that he had not sufficient capacity to act with discretion in the ordinary affairs of life, the plaintiff cannot recover,” is a correct statement of the law.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—Suit by the appellants to foreclose a mortgage on certain real estate, executed by Rudolph Rogge, deceased, against his widow, children, and administrator. The answers of the defendants set up two grounds of defence, in separate paragraphs; first, the insanity of Rudolph Rogge at the time of executing the mortgage; and second, that he was then so intoxicated as to be incapable of executing the same.

Reply, first, general denial; and second, as to the second paragraph of the answer, that the notes sued on were given for a stock of merchant tailoring goods, sold by plaintiffs to said Rudolph Rogge in his lifetime; that they were delivered to him, and he used the same, and that neither he nor his representative returned, or offered to return, the same, or any part thereof, to the plaintiffs.

The defendants demurred to this second paragraph of reply, and their demurrer was sustained. The plaintiffs excepted.

There was a trial by jury, a general verdict for the defendants, and findings in answer to interrogatories as follows:

“1. Was Rudolph Rogge, deceased, at the time he signed the notes and mortgage sued on, so destitute of understanding

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as not to know what he was doing?" Answer. "We believe that at the time of the execution of the notes and mortgage, the said Rudolph Rogge's mind was so shattered by his habits of life as to render him incapable of acting with discretion in the ordinary affairs of life."

"2. Does the evidence show the drunkenness of Rudolph Rogge, at the time of the execution of notes and mortgage sued on, to have been so great as to produce an absolute privation of understanding, for the time, similar to cases of idiocy or insanity?" Answer. "He may not have been absolutely deprived of his understanding, but we believe that his mind was in such a condition as to render him incapable of acting with discretion in the ordinary affairs of life."

The plaintiffs moved the court for judgment on the special findings, which was overruled. They then moved the court for a new trial, which motion was also overruled by the court, and the plaintiffs excepted and put the evidence and instructions of the court to the jury in the record. Final judgment was then rendered for the defendants, from which the plaintiffs appealed to this court, and here they have assigned the following errors:

In sustaining the demurrer to the second paragraph of the reply, and not holding the second paragraph of the answer bad; in overruling the plaintiffs' motion for judgment on the special findings; in overruling the plaintiffs' motion for a new trial. Several other errors are assigned, but they are only the repetition of reasons for a new trial, and need not, therefore, be particularly noticed.

We think the second paragraph of the answer was sufficient. Mental incapacity, at the time of contracting, produced by drunkenness or any other cause, is a good defence against a contract, whether that contract be evidenced by deed or parol. If the mind be incapable of assenting, the law pronounces the contract void. Drunkenness of itself merely, unless fraud be practised, will not avoid a contract; but if the party be in such a state of intoxication that he is,

for the time, deprived of reason, the contract is void. *Fenners v. Howard*, 6 Blackf. 240; 2 Kent Com. 451; *Henry v. Ritcnour*, 31 Ind. 136. The exact ground assumed by counsel for the appellants on this point is, that this paragraph of the answer is bad, for the reason that it does not allege that the plaintiffs had notice of the condition of the mind of Rogge at the time of entering into the contract. They refer to authorities in support of this position, which we have examined, and which do not, we think, sustain the position assumed. It is not a question of notice, but one of mental power or capacity.

If the second paragraph of the reply was intended to show a ratification of the contract by Rogge, it falls short of showing that fact. It simply alleges that the notes were given for goods, which were delivered to Rogge, used by him, and never returned to the plaintiffs. If it was intended to shift the ground of action from the notes and mortgage to a claim for goods sold, it was bad on the ground of departure. To show a ratification of the contract by Rogge, it should have been shown that he became sober and in his right mind, and that, in that condition, he did some act amounting to a ratification. If he ever afterward became competent to ratify the contract, that fact is not averred in the reply.

The plaintiffs asked the court to submit to the jury two interrogatories, to be answered by the jury, designed to show that Rogge kept the goods and ratified the contract. These interrogatories were correctly refused, for the reason that there was no issue to which the finding designed to be elicited could apply. If there was, by any means, a ratification of the contract by the deceased, it was affirmative matter which should have been replied.

For the same reason it was proper for the court to refuse to allow evidence to go to the jury on the subject of a ratification of the contract, of which ruling complaint is made.

The fifth charge asked, which was on the subject of a rati-

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fication of the contract, was rightly refused for the same reason. There was no such question properly before the jury.

This instruction was given: "If the deceased, at the time of the execution of the mortgage, as a result of drunkenness or any other diseased condition of the mind, was deprived of his understanding, so that he had not sufficient capacity to act with discretion in the ordinary affairs of life, the plaintiff cannot recover." This instruction seems to be warranted by the law as recognized by this court in the case of *Jenners v. Howard, supra*.

This instruction was asked by the plaintiffs, and refused: "The execution of the notes and mortgage sued on having been admitted, it is incumbent on the defendants to show that Rudolph Rogge, now deceased, was at the time, or before the execution of the same, of unsound mind. And if they have shown him to be of unsound mind before the execution of the same, and such unsoundness was caused by some temporary or transient cause, as monomania or drunkenness, still the plaintiffs will be entitled to recover, unless they have shown that said Rogge was of unsound mind at the time he executed the same."

We think the instructions given by the court sufficiently called the attention of the jury to the fact that the unsoundness of mind, or the intoxication of the deceased, in order to avoid the contract, must have existed at the time when the contract was made. For this reason, although the charge asked was correct, except, perhaps, in classing monomania as temporary insanity, it was not error to refuse it.

This instruction was asked by the plaintiffs, and refused: "If the defendants rely upon the drunkenness of Rogge to defeat the plaintiffs' right to recover, they are bound to prove the drunkenness to have been so great, at the time of the execution of the notes and mortgage sued on, as to produce an absolute privation of understanding, for the time, similar to cases of idiocy or lunacy, else the plaintiffs will be entitled to recover. The court struck out the words "similar to cases

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of idiocy or lunacy" and gave it, to which plaintiffs at the time excepted.

The striking out of these words did not materially change the instruction.

The next point is, that the court should have rendered judgment for the plaintiff on the special findings. But, suppose that the special findings, with reference to the degree of mental incapacity, are not so conclusively in favor of the defendants as they might have been, still the general verdict being for the defendants, it is difficult to see how the judgment could be for the plaintiffs. There was no error in overruling the motion.

The case is not such as to allow us to interfere with the result upon the facts of the case. The question was upon the validity of the notes and mortgage. We express no opinion as to whether or not the estate of the deceased is liable for the goods sold.

The judgment is affirmed, with costs.

D. V. Burns, C. Hamlin, and G. W. Stilwell, for appellants.

T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for appellees.

THE CHICAGO, CINCINNATI, AND LOUISVILLE RAILROAD COMPANY v. WEST.

87	211
162	415

PLEADING.—*Complaint Containing Defence and Reply.*—It will not render a complaint subject to a demurrer for want of sufficient facts, that after stating a cause of action for goods sold and delivered at the request of and on account of the defendant, it proceeds to anticipate and avoid the defence to the action.

MOTION TO STRIKE OUT.—*Bill of Exceptions.*—A refusal to strike out part of a complaint must be presented as error by a bill of exceptions.

CONSIDERATION.—*Promise for Benefit of Third Person.*—Where a complaint charged that a railroad company promised to pay for goods which should be furnished to a sub-contractor, an answer that the railroad company was not indebted to the sub-contractor was held no defence on demurrer.

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PRACTICE.—*Demurrer*.—Where a demurrer is sustained to an answer which only amounts to the general denial, it will not be available error, if the general denial be also pleaded.

EVIDENCE.—*Explanation of Delivery of Draft*.—Evidence to explain under what circumstances a draft on one officer of a railroad company was accepted by another officer of the same company, and delivered to the plaintiff having an account against the company, is admissible, there being an averment in the complaint that the draft was not delivered or received as payment. Such evidence does not contradict the tenor of the draft.

APPEAL from the Miami Circuit Court.

DOWNEY, J.—The appellee sued the appellant, alleging in his complaint, that the railroad company, through E. H. Leaming, its duly authorized agent, authorized and directed the plaintiff to furnish and deliver, on the credit of the defendant, to Maurice Quinn, a sub-contractor on the road of said company, who was engaged in the construction of the road-bed thereof, in the county of Miami, such groceries and supplies as might be needed for boarding and furnishing the laborers employed by said Quinn as such sub-contractor; that in pursuance of the authority and instructions so given by said Leaming, agent as aforesaid, plaintiff furnished and delivered, from the 1st day of December, 1867, to the 15th day of January, 1868, groceries, provisions, and supplies to said Quinn for the purposes aforesaid, to the amount of five hundred and fifty-eight dollars and sixty-three cents, of which one hundred and fifty dollars was afterward paid, and at the request and for the convenience of said defendant charged the same upon his books to the account of said Quinn, a copy of which account is filed with the complaint; that thereafter, to wit, on the 14th day of January, 1868, the said railroad company, for its own convenience merely, but not in payment, satisfaction, or transfer of said debt, caused to be drawn by said Quinn a certain order on E. H. Scott, an agent in their employ, for one hundred and eighty-four dollars and thirty cents, which order was accepted by said Leaming, and delivered to plaintiff; and, also, on the 15th day of January, 1868, a similar order for two hundred and twenty-two dollars and thirty-three cents was drawn and ac-

The Chicago, Cincinnati, and Louisville Railroad Co. v. West.

cepted by the same parties. Copies of each of which are filed with the complaint. Which orders were received by plaintiff as an acknowledgment of the amount of the indebtedness by the railroad company to that date, and for no other purpose or effect whatever; that the amount of said account, to wit, the sum of four hundred and seven dollars and sixty-three cents, with interest thereon from January 15th, 1868, is due and wholly unpaid; wherefore, etc.

The orders, copies of which are filed with the complaint, are as follows:

"\$185.30.

January 14th, 1868.

"MR. E. H. SCOTT:—You will please pay to the order of E. West one hundred and eighty-five dollars and thirty cents out of any money that may accrue to me out of a final settlement, or from monthly estimates after the laborers are paid.

MAURICE QUINN.

"Charged to C., C., & L. Railroad Company.

"Accepted on the within conditions. E. H. LEAMING."

"\$222.33.

PERU, IND., January 15th, 1868.

"MR. E. H. SCOTT:—You will please pay to the order of E. West two hundred and twenty-two dollars and thirty-three cents, amount due him from 1st of January to 15th of January, 1868, and charge. Yours,

MAURICE QUINN.

"Charged to C., C., & L. Railroad Company.

"Accepted after laborers are paid, if any means due Quinn.

"E. H. LEAMING."

The defendant demurred to the complaint, for the reason that it did not state facts sufficient to constitute a cause of action; its demurrer was overruled, and it excepted.

It then moved the court to strike out of the complaint all that relates to the giving of the orders, and that they were not received in payment of the claim for the goods sold; also, to strike out certain items from the bill of particulars filed with the complaint; which motion was overruled, and the defendant excepted, but filed no bill of exceptions.

The defendant then answered in three paragraphs; first, the general denial; and, second, as to one hundred and eighty-

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five dollars and thirty cents of the sum claimed, that the railroad company was not, on the 14th day of January, 1868, nor since, indebted to Maurice Quinn in that or any other amount, on final settlement or from monthly estimates, after laborers who were working for him were paid; wherefore, etc.; third, as to two hundred and twenty-two dollars and thirty-three cents of the amount claimed, the railroad company was not, on the 15th day of January, 1868, nor since, indebted to Maurice Quinn in said sum, nor in any other sum, after the payment of laborers who worked for said Quinn, and that the defendant did not promise or agree to pay said sum or any part of it otherwise than is stated in said order for that amount; wherefore, etc.

The plaintiff demurred, separately, to the second and third paragraphs of the answer, for the reason that they did not state facts sufficient to constitute a defence. His demurrers were sustained, and the defendant excepted.

There was then a trial by jury, verdict for the plaintiff for four hundred and sixty-two dollars, motion for a new trial by the defendant overruled, and judgment on the verdict.

The motion for a new trial was for the reasons, "first, the verdict of the jury is contrary to the evidence; second, the verdict of the jury is contrary to the law and the evidence; third, error of law occurring at the trial, and excepted to by the defendant at the time; fourth, the court erred in the admission of testimony offered by the plaintiff, and objected to by the defendant; fifth, the court erred in sustaining the demurrer of the plaintiff to the second paragraph of the defendant's answer; sixth, the court erred in sustaining the demurrer of the plaintiff to the third paragraph of the defendant's answer; seventh, the court erred in its instructions to the jury."

All the evidence is set out in the bill of exceptions, but there are no instructions in the record.

The appellant has assigned the following errors: first, the overruling of the demurrer to the complaint; second, the overruling of the motion to strike out parts of the com-

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plaint; third, sustaining the plaintiff's demurrer to the second paragraph of the defendant's answer; fourth, sustaining the demurrer of the plaintiff to the third paragraph of the defendant's answer; fifth, in admitting illegal testimony offered by the plaintiff, and objected to by the defendant; sixth, in refusing to grant a new trial.

We see no valid objection to the complaint. It is true that it might have gone on the ground of goods sold and delivered, and when the orders were pleaded as payment, the plaintiff might have replied, avoiding or denying that they were received in payment. The facts would then have appeared in the record substantially as they are set out in the complaint. Although it is unusual, we see no reason why the plaintiff may not anticipate, in his complaint, the defence which he apprehends the defendant will rely upon, and avoid or deny it.

The motion to strike out presents no question, for the reason that the point was not reserved by a bill of exceptions. *Swinney v. Nave*, 22 Ind. 178.

The matter set up in the second paragraph of the answer was not a defence to the claim for goods sold and delivered. If the company agreed to pay for the goods furnished to the sub-contractor, it was immaterial whether the company was indebted to him or not. Had the suit been on the orders, such an answer would have raised a material question.

The third paragraph of the answer is a good defence to the part to which it is pleaded, because it not only alleges that the company was not indebted to Quinn, so as to make it liable to pay the order, but it also alleges that the company "did not promise or agree to pay said sum, or any part of it, otherwise than as is stated in the order." The demurrer to this paragraph should have been overruled. But this error cannot reverse the judgment, for the reason that the general denial, which was filed, put the same matter in issue, and under this issue the same evidence was admissible as would have been admissible under the third paragraph of the answer. *Harrison v. Bryant*, 5 Ind. 160.

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The only objection which we find in the record to any evidence offered by the plaintiff is this: When Mr. Neff was testifying on behalf of the plaintiff, he stated, "that about the date of the above orders, in a conversation between the witness and Mr. Leaming, in relation to the goods got by Quinn, Leaming said they wanted to get rid of him (Quinn), and that the orders were drawn up and accepted by Leaming in their present form, at the instance of Leaming, and for the accommodation of the company." The defendant did object to this statement, "explaining said orders," as the bill of exceptions says, and, the court having overruled the objection, the defendant excepted. This evidence was admitted, we presume, in support of the allegation of the complaint, that the orders were given for the convenience of the company or its officers, and not in extinguishment of the claim for goods sold. For this purpose we think it was admissible. Whether the orders were received as payment of the claim for goods sold, or for some other purpose, was a question of fact for the jury. The evidence was not to contradict, nor did it contradict, the orders. An order or bill of exchange drawn by a person on himself may be regarded as his promissory note, and may be declared upon and treated as such, and this rule is applied to corporations, when an order has been drawn by one officer thereof on another. *The Marion and Mississinewa Railroad Co. v. Hodge*, 9 Ind. 163. Let it be supposed, then, that the orders in question are to be treated as the promissory notes of the railroad company, what is the effect of the receiving of them by the plaintiff? It seems to be the law, that the giving of the debtor's promissory note for a precedent debt is not an extinguishment or satisfaction of the pre-existent debt. At all events, it may be shown by evidence whether it was or was not received as such. 2 Greenl. Ev., sec. 521; 2 Am. L. Cas. 242. If the orders were received by the plaintiff, neither as absolute nor conditional payment of the pre-existent debt for the goods sold, but only for the convenience of the company, we do not see any objection to the proof of the fact. The

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plaintiff had taken upon himself the proof of it by alleging the giving of the orders, and stating the reason for so doing. It was one of the facts in the case, and we think the court committed no error in allowing proof of it. The only objection to the evidence was, that it contradicted the written orders, and we hold that it was not objectionable on this ground. This is all that we decide on this point.

The last question is as to the correctness of the ruling of the court in refusing to grant a new trial on the motion of the defendant, on the ground of the insufficiency of the evidence to justify the verdict of the jury. We cannot reverse the judgment on this ground.

The judgment is affirmed, with costs.

N. O. Ross and *R. P. Effinger*, for appellant.

J. L. Farrar and *L. Walker*, for appellee.

MILLER, EX'R, v. GOLDTHWAIT, ADM'R.

WRITTEN CONTRACT.—*Attempt to Change by Parol.*—Where an order was given upon A. to pay certain claims out of the proceeds of a certain note in his hands, and he accepted the same in writing, "so soon as the maker pays the note," and A. afterward obtained a judgment and foreclosure of a mortgage given to secure the note held by him, and bought in the mortgaged property, and was subsequently offered more than the sum due upon the note for the property;

Held, that he could not defend against the payment of the claims included in the order accepted by him, on the ground that the person who gave the order was, at the time when A. accepted the same, indebted to A. for more than the amount at which he had bid in the land, and that it was understood by the person for whose benefit he accepted the order that this indebtedness was to be first paid, and that it was not yet discharged.

APPEAL from the Grant Common Pleas.

PETTIT, J.—The substance of the complaint is, that one Geegan was indebted to Thornburg for money paid as the security of Geegan; and also on a note for forty-five dollars and

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eighty cents to one Jackson; that Peirce was indebted to Geegan in the sum of one thousand dollars for a note assigned to him on one King, by Geegan; that to pay his indebtedness, Geegan gave the following order to Barley on Peirce:

“MARION, December 23d, 1867.

“Mr. Henry Peirce—You will please to pay to John U. Barley the amount of a judgment rendered at the last term of Grant Circuit Court against one Shadrick Thornburg; also, the amount of a note Matthew Doyle holds against me and Shadrick Thornburg for one hundred and seventy-five dollars and fifty cents; also, to Curtis Jackson a claim of forty-five dollars and fifty cents, the same now pending in the common pleas court in attachment, out of the proceeds of the Smith King note, and oblige
P. GEEGAN.”

This order was accepted, as follows:

“I accept the within order, and will pay the same so soon as Smith King pays the note made to Geegan and assigned to me. December 23d, 1867. HENRY PEIRCE.”

The order was assigned by Barley to Thornburg, who, it is alleged, had paid the indebtedness named in the order as security of Geegan; that Peirce obtained a judgment against King on the note assigned to him by Geegan, for one thousand and fourteen dollars and sixteen cents, and a foreclosure of the mortgage given to secure the payment of the note; that Peirce bought in the land on foreclosure sale for four hundred and fifty dollars; that it was worth one thousand dollars; and that Peirce had been offered that amount for it since the sale, and that he refused to take it; that Peirce refused to pay any part of said order, and demands judgment for one thousand dollars.

There was a demurrer to the complaint for want of sufficient facts, which was overruled, and defendant excepted.

The appellee's attorneys in their brief say that they have assigned this ruling as a cross error. But they are mistaken in this, there being no cross error assigned on the transcript; and the appellee cannot, therefore, avail himself of any defect in the complaint. The defendant answered, first, by

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general denial. We adopt the abstract of appellee (both parties having made abstracts) of the second paragraph of the answer, giving him the benefit of his own view of its contents.

"Second. That before acceptance of said order, said Geegan owed said Peirce six hundred dollars, to secure which he transferred to Peirce the Smith King note; that when said Peirce accepted said order it was fully understood by all parties that said Geegan owed said Peirce, as aforesaid, and that said Peirce accepted said order to pay the same only after said debt should be liquidated out of the Smith King note; that said King has never paid any part of said note except said four hundred and twenty-five dollars, for which said realty sold, as aforesaid; and that said King is insolvent, and his application in bankruptcy is now pending."

The appellant demurred to this paragraph for want of sufficient facts, which was overruled, and he excepted; and this ruling is assigned for error. This paragraph of the answer was a clear and manifest attempt to change and vary the terms of a written contract (the acceptance) by parol evidence, which is not allowable in such case as this, where neither fraud, accident, nor mistake is alleged. It would be a fraud on the assignee of such an order and acceptance to allow such an answer. We need not cite authorities, for they are all one way. This ruling must reverse the judgment.

There were replies to this paragraph of the answer; first, general; second, special; and a demurrer for want of sufficient facts was sustained to the special reply, and exception, and a withdrawal of the general denial of the reply, and judgment for the appellee allowed to go on the pleadings; but we need not notice the action of the court or parties on these points after the overruling of the demurrer to the second paragraph of the answer, as the pleadings will have to be reformed.

The judgment is reversed, at the costs of the appellee.

John Brownlee, H. Brownlee, J. VanDevanter, and J. F. McDowell, for appellant.

James Brownlee and J. L. Custer, for appellee.

Schofield v. Holland.

SCHOFIELD v. HOLLAND.

PROMISSORY NOTE.—*Fraud in Consideration.*—*Answer.*—To an action on a promissory note the defendant answered, that he had purchased a farm, in the year 1858, from the plaintiff, and had executed his note for eight thousand dollars, payable in twenty years, with interest yearly, receiving a title bond; that finding he had been deceived in the quality of the land and was unable to pay the interest in full, the plaintiff promised him that if he would make certain improvements thereon, greatly enhancing the value of the farm, on final settlement he should be allowed a deduction on the contract price; that in 1868, the plaintiff informed him that he could sell the farm for seven thousand five hundred dollars, which was all he could realize for it, and if the defendant would execute his four notes, payable yearly, for one hundred and twenty-five dollars each, and surrender the title bond, he, the plaintiff, would remit the interest due, some one thousand two hundred and sixty dollars, and return the note for eight thousand dollars; that relying on the statement that seven thousand five hundred dollars was all the plaintiff could realize for the land, he did execute the four notes, one of which is the note in suit, and surrendered his title bond for the land, and received the credit for the interest, and also his note for eight thousand dollars, and he says that when the plaintiff made the false and fraudulent statements on which he, defendant, acted in making the surrender of his bond, the plaintiff had already, without his knowledge, contracted the sale of the land for fourteen thousand five hundred dollars, and has since conveyed the same and received the money, wherefore he asks the cancellation of the four notes, and damages.

Held, that this was a good defence to the action on the notes.

APPEAL from the Franklin Common Pleas.

BUSKIRK, J.—The appellee sued the appellant on a promissory note. The appellant answered in two paragraphs. The first was the general denial. The second was as follows:

“The defendant, for a further answer, says that heretofore, to wit, on the 11th day of February, 1858, the defendant purchased of the plaintiff the south half of section thirty-two, and the south half of the north-west quarter of section thirty-two, town thirteen, range twelve, in Fayette county, Indiana, for and in consideration of the sum of eight thousand dollars, payable within twenty years, with interest from date, and at the same time the plaintiff executed to said defendant his bond for a good and sufficient deed, in fee simple, at the expiration of twenty years, the interest on the said note payable annually; that the defendant took the posses-

sion of the said land, under the said purchase, but soon after found that he was greatly deceived as to its value and productiveness, and that he would be unable to pay said sum and said interest, and so informed the plaintiff; whereupon, the plaintiff promised and agreed with the defendant that if he would improve the said farm by clearing off and preparing for cultivation a large tract of timber land, fixing up the fences, improving the buildings, and improve the soil then in cultivation by clearing and grassing the same, and thus enhance the value of the farm, the said plaintiff would make it all right with him in the end by reducing the amount of the purchase and making the terms more easy. The defendant, relying on these promises, cleared off and put in cultivation over one hundred acres, at a large expense, and made the fences and buildings all good, and greatly improved and enhanced the value of the said farm at great expense to him, and from year to year paid the said plaintiff all that he could realize out of the products of the said farm, over a bare living; that about the month of March, 1867, the plaintiff and defendant had a settlement, when it was ascertained that the defendant had paid the plaintiff about three thousand one hundred dollars, and that there was still due a balance of about one thousand two hundred and sixty dollars on the interest, for which amount the plaintiff required the defendant to give his three notes for four hundred and twenty dollars each, payable in one, two, and three years, at the same time renewing his promise that if he, the defendant, would do so, he, the plaintiff, would make it all right by reducing the amount of the original purchase, and that if he, the defendant, would continue to improve the said farm, he, the plaintiff, would aid in the sale of it, and in the end make a deduction of the interest in consideration that the defendant had originally agreed to pay entirely too much for the land.

“He says that he continued as before to cultivate and improve the land with a view to enhance the value of it, until about the 27th day of May, 1868, when the plaintiff came

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to him and told him that he had an opportunity of selling the farm at seven thousand five hundred dollars, which was all that he could get for the same; that the purchaser was James Cook, and that he believed that the defendant had better authorize or allow him to sell it at that sum; that it was all he could get for it, and at the same time the plaintiff proposed to surrender to the defendant the one thousand two hundred and sixty dollars interest notes, given as aforesaid, in consideration of the improvements put upon the same by the said defendant, as aforesaid; and that if the defendant would give his notes to the plaintiff for five hundred dollars in four equal annual payments of one hundred and twenty-five dollars each, which, together with the seven thousand five hundred dollars which he could sell the farm for, would make eight thousand dollars, the amount of the original purchase, he, the plaintiff, would surrender to him, the defendant, the eight thousand dollar note, and the defendant to surrender to him, the plaintiff, the title bond aforesaid, and the purchaser was to have one-third of the crops then growing and on the place. The defendant, relying upon the truth of the plaintiff's statements, that he could sell the farm for only seven thousand five hundred dollars, and that said sum was the very best and highest price that he could realize from said purchase for it, and knowing that he was largely indebted to the plaintiff, and unless he consented to the said sale, that plaintiff would force him to pay all of said indebtedness, consented to sell said land to the said purchaser, and authorized the said plaintiff to sell the same, with the distinct understanding that seven thousand five hundred dollars was all that could be realized and that the plaintiff was realizing in the sale of the said farm, and that he, the defendant, was to have and was getting the benefit of all that the farm sold for.

“He further avers that relying upon the representations of the said plaintiff as aforesaid, he then and there gave to the plaintiff the four notes for five hundred dollars, to wit, the note sued on, and one for one hundred and twenty-five

dollars, due May 27th, 1870, and one for one hundred and twenty-five dollars, due May 27th, 1871, and one for one hundred and twenty-five dollars, due May 27th, 1872; and at the same time, the plaintiff delivered up to him the interest notes as aforesaid, amounting to one thousand two hundred and sixty dollars, in consideration of the improvement and expenditures put upon the said farm as aforesaid, and the plaintiff surrendered to the defendant the eight thousand dollar note originally given for the farm, and the defendant surrendered to the plaintiff the title bond originally given to the defendant, all in consideration of the truth of the statements of said plaintiff as aforesaid.

“The defendant avers and charges that the said plaintiff had then, and at the time of said statements, either contracted, or had the promise and assurance of a contract, for the sale of the said farm at fourteen thousand five hundred dollars, and the plaintiff realized, in the sale of the said farm, said sum, and executed his deed therefor to the said James Cook, for and in consideration of the said sum of fourteen thousand five hundred dollars; and that the plaintiff knew, at the time he made said statements, that he was to realize for the said farm the sum of fourteen thousand five hundred dollars, and that he (the plaintiff) concealed from the defendant the real and full consideration that he was to get for said farm, in order to procure from the defendant the notes aforesaid, and the title bond as aforesaid, for the purpose of defrauding the defendant in the sale of the said farm, and in the procuring of the said notes.

“Whereby and by reason of the premises, the defendant avers that the said notes, including the note sued on, and the three notes due May 27th, 1870, 1871, and 1872, are without consideration and void, and the defendant is damaged in the sum of six thousand five hundred dollars, being the amount realized by the plaintiff in the sale of the said farm over the eight thousand dollar note, for which he claims judgment; and he further prays that said notes be

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declared and decreed null and void, and for all other relief."

The appellee demurred to the second paragraph of the answer, upon the ground that it did not contain facts sufficient to constitute a defence. The court sustained the demurrer, and the appellant withdrew the general denial, and refused to plead further, and the court rendered judgment for the plaintiff, and the appellant excepted to the ruling of the court in sustaining the demurrer to the second paragraph of the answer.

The only error assigned is based upon the action of the court in sustaining the demurrer to the answer. Was such ruling correct? We are quite clear that the facts stated in the answer showed that the appellant was induced to surrender his interest in the farm and accept of the terms offered by the appellee, by the false and fraudulent representations of the appellee. The appellee had sold the farm for eight thousand dollars. The appellant had paid over three thousand dollars of interest and had greatly added to the value of the farm by improvements. The appellee represented that he could sell the farm for seven thousand five hundred dollars; that that was the highest price that he could obtain, and the defendant, in reliance upon such representations as true, was induced to surrender up the title bond, and execute the notes for five hundred dollars, upon the belief that the appellee had only realized seven thousand five hundred dollars upon the sale of the farm to Cook, when he had realized fourteen thousand five hundred dollars. It seems to us, that upon the facts stated, the entire transaction was tainted with fraud. It was certainly a good defence to the notes sued on. It is not necessary that we should now express any opinion as to what relief, if any, the appellant is entitled to, beyond a defence to the note in suit. See *Frenzel v. Miller*, ante, p. 1.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new

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trial, and then overrule the demurrer to the answer, and for further proceedings in accordance with this opinion.

W. Morrow and *N. Trusler*, for appellant.

C. C. Binkley, for appellee.

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155	197
155	208

TAX.—*Municipal Purposes.*—*National Banks.*—A tax on the capital stock of a national bank, for school purposes, or for a donation by a township to aid in building a railroad, is not a tax levied for municipal purposes, within the meaning of the ninth section of the act of March 15th, 1867, 3 Ind. Stat. 34.

87	225
158	172

APPEAL from the Marion Superior Court.

WORDEN, C. J.—Deloss Root, suing for himself as well as all others interested in the question, filed his complaint against the appellees, to restrain the collection of three items of taxes assessed against shares of the capital stock of the First National Bank of Indianapolis, viz.: first, a tax of twenty-five cents on the hundred dollars, levied by the school trustees of the city of Indianapolis, for school-house purposes in said city; second, a tax of one cent on the hundred dollars, levied for Center township; third, a tax of twenty cents on the hundred dollars, levied by the commissioners of Marion county, on the property of Center township, to aid, by way of donation, the Illinois Central Railway Company.

A demurrer was sustained to the complaint in the court below, at the special term, which ruling was sustained on appeal to the general term.

The plaintiff below seeks a reversal of the judgment rendered against him on demurrer.

In respect to the item of taxes to aid the railway company, it may be observed that in the case of *John v. The*

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Cin., etc., R. R. Co. 35 Ind. 539, this court decided that a township might aid, by way of subscription to the stock of a railroad company, as well as a county. And in the opinion of a majority of the court, a donation and subscription stand upon essentially the same ground. They are both provided for by law and must stand or fall together.

These observations bring us to the main and only other objection to the taxes in question, which is that they are assessed for "municipal purposes," in violation of section 9 of the act of March 15th, 1867, 3 Ind. Stat. 34, which provides as follows, viz.:

"Nothing in this, or any other act, shall be so construed as to authorize the taxation of stock in the bank of the State of Indiana, or in any national bank, for municipal purposes."

By the statute above cited, provision is made for taxing the shares of capital stock "in any bank or banking association, chartered or organized under the laws of this State, or chartered or organized under the laws of the United States, and having its banking house, or place of business, in this State."

The question arises, what is meant by the words "municipal purposes," as used in the section above quoted?

The appellant contends that the words were used in the broad sense that would embrace taxation for county and township purposes, as counties and townships are municipalities. But in this broad sense, a municipality embraces the State itself. This broad construction of the words would defeat the entire law, inasmuch as the State is as much a municipality as a county or township. Webster says, "Municipal, as used by the Romans, originally designated that which pertained to a *municipium*, a free city or town. It still retains this limited sense, but we have extended it to what belongs to a state or nation as a distinct, independent body. Municipal law or regulation respects solely the citizens of a state, and is thus distinguished from commercial law, political law, and the law of nations."

We are of opinion that the word "municipal," as used in the above statute, was used in its original restricted sense,

having reference to the incorporated cities and towns in the State having authority to levy and collect taxes, and that the restriction extends only to taxes for such city or town purposes. This construction is adopted from several considerations; first, if an enlarged meaning is to be given the word "municipal," so as to embrace counties and townships, no very good reason occurs to us why it should not embrace the State, which would defeat the law itself, or the section above set out would be nugatory; second, laws exempting property from taxation are to be strictly construed; *The Common Council of Indianapolis v. McLean*, 8 Ind. 328; third, the history of legislation on this subject places the construction we have adopted beyond reasonable question.

The charter of the Bank of the State of Indiana contains the following section:

"Sec. 15. The capital stock of said bank shall be subject to the same rate of taxation for state and county purposes as the property or stock of other moneyed corporations; and the real estate and other property of said bank and branches, situated in any city or town, shall be taxable for municipal purposes, in the same manner as other property so situated, but the capital stock of said bank or branches shall not be taxable for municipal purposes." 1 G. & H. 142. In this section it is too clear to admit of controversy, that towns and cities are the municipalities contemplated, and that the prohibition to tax for municipal purposes is a prohibition only to tax for town or city purposes.

This prohibition was held valid in the case of *The Bank v. The City of New Albany*, 11 Ind. 139. In the case cited, there is no intimation that the prohibition extended beyond cities and towns.

If there is any such provision in the general banking law of the State, it has escaped our notice.

Then came the national banks. An act of congress permits the shares in the capital stock of the national banks to be taxed by the States; provided, "that the tax so imposed under the laws of any state, upon the shares of any of the

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associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located." See *Wright, Auditor, etc., v. Stils*, 27 Ind. 338.

Now, in the act of March 15th, 1867, it is apparent that the legislature intended to put the bank of the State and the national banks, in respect to taxation upon their shares of stock, upon an equality, and that they used the term "municipal purposes" therein in the same sense in which it was used in the act providing for the establishment of the bank of the State.

The township tax, and the tax levied by the board of commissioners for railroad purposes, are in no sense levied for municipal purposes within the meaning of the law in question. The same is also true with respect to the tax levied by the school trustees of the city for school-house purposes. These taxes for school-houses are not levied for any purposes of cities as such, but for a state purpose in the fullest sense of the term. They are levied to carry out the system of common school education provided for by the State, and by virtue of the laws of the State. To be sure, "each civil township and each incorporated town or city in the several counties of the State is hereby declared a distinct municipal corporation for school purposes." 3 Ind. Stat. 441, sec. 4. Thus each civil township in the State, as well as each incorporated city and town, is made an instrumentality by means of which the educational purposes of the State are carried out. But when taxes are assessed by means of these instrumentalities, for building school-houses, they are assessed for school or educational purposes, and not for municipal purposes.

We are of opinion that no error was committed by the court below.

The judgment below is affirmed, with costs.

S. E. Perkins, F. J. Mattler, and S. E. Perkins, Jr., for appellant.

L. Barbour and C. P. Jacobs, for appellees:

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GAFF ET AL. v. GARNIER ET AL.

MANUFACTURING COMPANIES.—The case of *Gaff v. Theis*, 33 Ind. 307, approved.

APPEAL from the Dearborn Circuit Court.

DOWNEY, J.—Judgment in this case was rendered in favor of the appellees against the appellants. The appellants were the directors of a corporation organized in 1865, under the act of May 20th, 1852, for the incorporation of manufacturing and mining companies, and companies for mechanical, chemical, and building purposes. 1 G. & H. 425, and acts amendatory thereof. The corporation incurred debts to the plaintiffs in 1867, while the defendants were directors, which it failed to pay. The company failed to make and publish the report of the condition of the company as required by the thirteenth section of the act, which failure, it is claimed, according to the fifteenth section, rendered the directors liable to pay the debts. The defendants were directors at the time when such report and publication should have been made. There is no question presented not decided in *Gaff v. Theis*, 33 Ind. 307, a similar case, against the same defendants. This law was amended in 1869, Acts 1869, special session, p. 89; but that amendment cannot apply here.

The judgment is affirmed, with five per cent. damages and costs.

D. S. Major and O. B. Liddell for appellants.

THE CITY OF EVANSVILLE ET AL. v. EVANS.

CITY.—*Improvement of Alley.—Injunction.—Dedication.—Pleading.*—Where an injunction was sought to restrain the city of Evansville from improving what was claimed by the city as an alley, it was answered, that the owners of the property, subject to the plaintiff's life estate, on both sides of the alley, had laid out and opened the same to correspond with the other alleys of the

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city, with the consent of the plaintiff, and, in 1858, had laid off lots on their grounds abutting on said alley, and described said lots as extending to the same, in deeds and conveyances; and that, with full knowledge of the plaintiff and the owners, said alley had been used by the public, exclusive of the use by the owners.

Held, that the answer was sufficient as showing a dedication to the public use; and that such facts could not be introduced under the denial, but must be averred by answer.

SAME.—*Lapse of Time*—Dedication of property as a highway may be shown by acts *in pais*, and lapse of time is not important under such circumstances.

APPEAL from the Vanderburg Circuit Court.

BUSKIRK, J.—The appellee, Saleta Evans, brought suit against the appellants. Her complaint reads as follows:

“Said plaintiff complains of said defendants, and says that she is the owner as tenant in fee, and is in the possession of the south-east one-half of a block of ground in the eastern enlargement of the city of Evansville, known on the plat of said enlargement as the ‘Evans homestead,’ more particularly hereinafter described; and that she is the owner in fee in reversion, after an estate for years, of one hundred by one hundred and fifty feet in the north-west corner of said block, being one hundred feet on Main Street and one hundred and fifty feet on Fifth street; and she is the owner in reversion, as tenant for life, after an estate for years, of the remainder of said block, to wit, two hundred and nine feet on Main street by one hundred and fifty feet on Sixth street, of the north-east part of said block. And plaintiff avers that said block of ground lies between Main and Locust streets, which are three hundred feet apart, said block extending from one street to the other, and said block extends also from Fifth street to Sixth street, a distance of three hundred and nine feet. And plaintiff further complaining, says that said eastern enlargement was originally platted and laid off by Robert Evans and others, and that said Robert Evans was at that time the owner of said block, and that by the plat of said enlargement there is no alley through said block; and said plaintiff avers that neither she nor any other of the persons under whom she claims said block, have ever dedicated any

portion of said block to the use of the public as and for a public alley; nor have they, nor the plaintiff, ever consented that the city authorities or the public, should appropriate any portion of said block to the public use as an alley.

"And the plaintiff avers that said block is within the corporate limits of the city of Evansville; and the common council of said city, pretending that there is an alley through the centre of said block, from Fifth street to Sixth street, have entered upon their minutes an order directing an alley to be excavated and paved through said block. A copy of said order, marked 'exhibit A,' is herewith filed; and in pursuance of said order, said common council have awarded the contract for making said excavation and pavement of said pretended alley to said defendant, Richardt, who, if not enjoined, will proceed to carry out said improvement; and plaintiff avers that by the grading so threatened, a deep excavation in the rear of her premises will be made whereby her yard and premises, now occupied by her, will be greatly damaged, or will require the building of a stone wall at great cost and expense. And plaintiff says that said city has never taken any steps to open an alley through said block, according to the provisions of the charter, by-laws, and ordinances of said city. But unlawfully assuming that an alley exists through said block, has proceeded to order its improvement by grading and paving, as aforesaid. And plaintiff says, that by means of said order of said council, and that following the same, said city is threatening to appropriate, and if not enjoined, will appropriate twelve feet in breadth by three hundred and nineteen feet in length through the centre of said block of private property to the public use, without making the plaintiff any compensation, or without taking any steps to have damages assessed.

"And plaintiff avers, that if not restrained, said common council will proceed to assess and charge to the plaintiff at least one-half the cost of making said grading and paving.

"All which actings and doings of the defendants are contrary to equity and good conscience, and if not enjoined,

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will produce great and permanent injury and injustice to the plaintiff.

"Therefore, plaintiff prays that upon the final hearing, the defendants may be perpetually enjoined from opening, excavating, and otherwise improving said alley, and for all other proper relief; and until the final hearing, the plaintiff prays a temporary restraining order."

"EXHIBIT A.

"On motion of Councilman Richardt, the following order was passed and adopted, three-fourths of all the members of the common council concurring therein:

"And now it is hereby ordered and directed by the common council of the city of Evansville, that the alley situate between Main and Locust streets, and extending from Fifth street to Sixth street, be improved by bringing the same to the proper grade as shown by the city surveyor. And it is further ordered that the cost and expenses of said improvement, as soon as the same can be ascertained, shall be assessed against all the lots or parts of lots adjoining or abutting on said alley, equally per front foot; that is, each foot of ground adjoining said alley on both sides thereof shall be charged with the same proportion of expenses of making said improvement, and the clerk is authorized to advertise for bids for doing said work, until the 8th day of August, 1870.

"And upon the passage of said order, the ayes and noes were called, and are as follows:

"Ayes—Elles, Van Riper, Muelhausen, Richardt, Carpenter, Schaum, Kerth, Heilman, and Doughty.—9.

"Noes—None."

A temporary injunction was granted.

The appellants filed the following answer:

"The said defendants, for answer to the plaintiff's complaint, admit that said block, in the complaint mentioned, was originally platted by Robert M. Evans, as a part of the eastern enlargement, and that no alley was designated or laid off in said block by said Evans; but they say that said Rob-

ert M. Evans departed this life in the year 1845, and that subsequent to his death, De Witt C. Evans and others became owners by devise of said block, subject to plaintiff's life estate therein, and that in the year 1858, said De Witt C. Evans and his co-devisees, with the full knowledge and consent of plaintiff, opened and laid out said alley through the whole width of said block, in such manner as to make it correspond exactly with the other alleys in said enlargement, and with the alleys in the donation enlargement of Evansville, which adjoined said eastern enlargement; and afterward said De Witt C. Evans and his co-owners of said block divided the same into lots by metes and bounds, all of which said lots fronted on Main street or on Locust street, and abutted on said alley; and said De Witt and plaintiff made, executed, and delivered to divers persons leases to said lots, which leases extended to and covered a period of ninety-nine years, and all of them described said alley, and described said lots as extending in the rear to said alley, and from, after, and during said year, 1858, with the full knowledge and consent of said De Witt, who is now dead, having departed this life in the year 1864, and with the full knowledge and consent of the plaintiff, the said alley has always been used, travelled, and gone through and over by all the citizens of Evansville, by the public generally, and by the tenants holding under said leases; which user by the citizens, public, and tenants, has been open, notorious, and exclusive of the use of the said alley by the owners thereof; whereupon defendants ask that said injunction be dissolved and judgment for their costs."

The record shows that this answer was demurred to by the appellee, and the demurrer was overruled. Afterward the appellee filed her reply. The appellants demurred to the reply. The demurrer to the reply was overruled, and exception taken. Afterward the appellee withdrew her reply and filed a demurrer to the answer, which demurrer was sustained, and exception taken by the appellants. The appellants failed to answer further, and final judgment was ren-

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dered in favor of the appellee, making perpetual the temporary injunction, to which appellants excepted.

The only question to be determined is, whether the court erred in sustaining the appellee's demurrer to the appellants' answer.

The learned counsel for the appellants have assumed, in argument, the following positions:

"The first question presented is this: Has the city of Evansville the power to order the improvement of an alley which has never been dedicated to the public? The complaint shows that the block of ground, through which this alley runs, is in the eastern enlargement of Evansville; that the block is bounded by the following named streets: Main, Sixth, Locust, and Fifth; that the distance from Fifth street to Sixth street is three hundred and nine feet. The answer shows that the alley was opened and laid out in 1858, from Fifth to Sixth street, with plaintiff's consent, and has ever since been used by the public. The question of taking private property for public use does not here arise. We claim that whether there has been a dedication or not is immaterial, and that the city has the power to order the improvement of this alley, irrespective of its character, whether public or private. The alley must necessarily remain open for ninety-nine years. Under such circumstances, the damages are only nominal. 8 Wend. 85; 11 Wend. 486; 19 Wend. 128; 1 Hill, N. Y. 189, 191; 2 Wend. 472. Equity will not enjoin for nominal damages.

"Our second position is that the answer shows a valid dedication of the alley to a public use. To constitute a dedication, there must first be an intention to do it on the part of the owner. But it may be manifested by writing, by declaration, or by acts. Washb. Easms. 180. Dedications have been established in every conceivable way by which the intention of the party could be manifested. The alley in question exactly corresponds with the other alleys in the same and adjoining enlargements in a city of twenty-five thousand people; it has been used as a public alley since 1858; lots

have been laid out abutting on it, and fronting on Main and Locust streets, and leases made for ninety-nine years. It is well settled that no period or term of enjoyment is necessary in order to have dedication become effectual. Washb. Easm. 139, section 21. In *Farvis v. Dean*, 3 Bing. 447, four or five years use of a passage way by the public was held sufficient to constitute a dedication. This court has made the same decisions in 8 Ind. 425; 10 Ind. 219; 7 Blackf. 512; 25 Ind. 352; 16 Ind. 40."

Washburn on Easements lays down the following propositions of law:

Section 19, p. 139. "To constitute a dedication requires, however, no grant or conveyance by deed or writing on the part of the owner of the land. If he shall do such acts *in pais* as amount to a dedication, the law regards him as estopped *in pais* from denying that the public have a right to enjoy what is dedicated, or from revoking what he had thus declared by his acts."

Sec. 21. "If, in this connection, it is asked what length of time is necessary in order to have a dedication become effectual, it is believed there is no period or term of enjoyment necessary, as in the case of prescription. Length of enjoyment may be regarded, when the evidence of a dedication having been made depends upon a user by the public of the thing dedicated. But as all that is requisite to constitute a good dedication is, that there should be an intention and an act of dedication on the part of the owner, and an acceptance on the part of the public; as soon as these concur, the dedication is complete. Ordinarily, there is no other mode of showing an acceptance by the public of a dedication, than by its being made use of by them, and this must be sufficiently long to evince such acceptance, depending, of course, upon the circumstances of each case. Six or seven years have, in some cases, been held to be sufficient, and in no case has the time been measured by that required to create a prescription."

Sec. 25, p. 145. "But where a street has been actually

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dedicated to the public by the act and intent of the owner of the soil, and by what shows an acceptance by the public, it becomes a public highway, and the owners of the adjacent land, whether the original proprietors or purchasers under them, have no other rights in it than the adjoining owners of any other public highway."

Sec. 26. "Citations might easily be multiplied, where streets have become dedicated as public highways, so far, at least, as the owner of the soil is concerned, although the same may never have been opened or wrought. And among them are cases where the owner of city lots has sold them by a plan on which streets have been designated by the proper officers to locate and establish the same, and has bounded the lots sold by such streets."

In *Irwin v. Dixon*, 9 How. U. S. 10, the Supreme Court of the United States states the law as follows: "Thus, it has been presumed, if one makes a plan of his land in a city with certain streets laid down between certain lots, and sells the lots accordingly, that he thus means to dedicate those streets to the public. *United States v. Chicago*, 7 How. U. S. 185, and cases cited there from *Wendell*; *White v. Cowen*, 4 Paige, 510; *Barclay v. Howell's Lessee*, 6 Pet. 498; *New Orleans v. The United States*, 10 Pet. 718. And more particularly is it so if the community are allowed to begin to occupy the streets accordingly. *Cincinnati v. Lessees of White*, 6 Pet. 431; 10 Pet. 718. But a mere survey of such streets, without selling the contiguous lots, or letting the streets be occupied, is not enough. 7 How. U. S. 185."

We have examined the cases above referred to as having been decided by this court, and find that they are in accord with the principles enunciated by Washburn and the Supreme Court of the United States.

We are of the opinion that the facts stated in the answer constitute a dedication to the public use. It is maintained by the counsel for the appellee, in a very able brief, that the court committed no error in sustaining the demurrer, for the reason that the answer only amounted to an argumental

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denial. We do not think so. As has been shown, a dedication may be shown by acts *in pais*, and such acts should be alleged in an answer, and could not be proved under a denial. It is also maintained, that it is a taking of private property for public use. We think otherwise. If the property was dedicated to the public, it ceased to be private property, and became a public highway, and the common council thus acquired jurisdiction over the alley.

We are of the opinion that the court erred in sustaining the demurrer to the answer. For this error the judgment must be reversed.

The judgment is reversed, with costs, and the cause is remanded, with directions to the court below to overrule the demurrer to the answer, and for further proceedings in accordance with this opinion.

C. Denby and *D. B. Kumler*, for appellants.

A. Iglehart and *J. E. Iglehart*, for appellee.

EX PARTE VOLTZ.

BASTARDY—Escape.—Rearrest.—Where in a proceeding in bastardy the defendant is adjudged to pay a certain sum, and is held in custody for failure to pay or replevy the same, and without the consent of the sheriff forcibly and unlawfully escapes from the jail, and the sheriff is sued for the escape, and suffers judgment, and pays the sum adjudged against the defendant, he may again arrest the defendant and hold him in jail in execution of the original judgment.

APPEAL from the Judge of the Ripley Common Pleas.

DOWNEY, J.—Voltz made affidavit that he was illegally restrained of his liberty in the jail of Ripley county by George W. Russ, the sheriff of that county. A writ of *habeas corpus* having issued, the sheriff returned that he held the petitioner in custody by virtue of the following facts: that in a proceeding against him for the support of an illegitimate child, in

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the name of the State, on the relation of Louisa Billman, the mother, in the Ripley Circuit Court, the petitioner had been adjudged the father of the child, and ordered to pay four hundred dollars for its support, and costs of the suit, and that he be committed to jail until the same was paid or replevied; that he failed to pay or replevy the same, and was by order of said court committed to the jail of the county; that without paying or replevying the judgment, and without the consent of the sheriff or his jailer, on the 26th day of September, 1867, he forcibly and unlawfully broke jail and escaped therefrom; that the sheriff, John W. Hamilton, pursued him, but he fled from the State, etc.; that the State, on relation of Louisa Billman, sued the sheriff for the escape, and recovered judgment for the amount of the judgment in the bastardy case, which he had paid. He further says that he now holds the petitioner at the request and instance of said Hamilton, who claims that because of the aforesaid facts, he is subrogated to the rights of the said Louisa Billman in the aforesaid original suit.

Voltz excepted to the return, and his exception was overruled; the return was held sufficient, and he was remanded to jail. From the judgment he appeals.

When this case, in a different form, was before us on a previous day of this term (*ante*, p. 175), we used this language: "It is provided by statute in this State that when the sheriff, or any surety on his bond, shall be compelled to pay any judgment, or any part thereof, by reason of any default of such officer, except for failing to pay over money collected, or for wasting property levied on, the judgment shall not be discharged by such payment, but shall remain in force for the use of the sheriff or surety making such payment, and, after the plaintiff is paid, so much of the judgment as remains unsatisfied may be prosecuted to execution for his use. 2 G. & H. 309, sec. 676. But this section gives the sheriff or surety no remedy until after the judgment shall have been paid; and then it would be a question whether the right would remain or exist to imprison the defendant, or only to

have execution against his property." Since that time the Sheriff, Hamilton, having paid the judgment of the State, on relation of Billman, against him, the petitioner was again imprisoned, at his request, he claiming to have been subrogated to the rights of Billman under the judgment, and among them the right to imprison the petitioner until the judgment shall be paid or replevied. A new writ of *habeas corpus* was sued out by the petitioner, a new return made by the sheriff, and judgment thereon, and another appeal prayed. So that the point which was not presented to us when the case was here before, and which we did not decide, is now presented for our decision. That question is, can the sheriff, after thus having paid the judgment, imprison the petitioner?

As we found in the other case, upon an examination of the authorities, that the bringing of the action against the sheriff by Louisa Billman was an election on her part to consider the defendant out of custody, and prevented her from again imprisoning him or continuing him in custody on that judgment, it follows that she had no right thereafter to have him imprisoned, whether her judgment against Hamilton was ever paid or not. If, then, the sheriff is subrogated to her rights under the judgment, by the payment thereof, the question is, whether he must take that right as she held it at the time when the money was paid on the judgment by him, or whether he has the rights and all the rights which she had originally under the judgment. The sheriff has been guilty of no misconduct. It is alleged in the return that the petitioner "forcibly and unlawfully broke jail and escaped." The manner of escape did not, however, save the sheriff from liability therefor. *The State, etc., v. Hamilton*, 33 Ind. 502. The petitioner did not pay or replevy the judgment. The case is a meritorious one on the part of the sheriff. The petitioner is now where he was ordered by the judgment of the court. If he can derive any benefit from his escape, it will be allowing him to secure an advantage from his own wrong. The language of the statute is suffi-

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ciently broad to justify us in holding, and we do hold, that on payment of the judgment, Hamilton acquired all the rights under it which Louisa Billman had when she made her election to look to the sheriff for payment, on account of the escape.

The language of the statute giving the sheriff the right "to prosecute the judgment to execution for his use" must be held to justify any legal mode of enforcing obedience to the judgment. The word execution must be held to mean the carrying into effect of the judgment of the court. Bouv. Dict., tit. Execution. It is provided by statute in this State, that "there shall be three kinds of execution—one against the property of the judgment debtor, one against his person, and one for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same." But the mode of executing judgment in cases of bastardy, in the first instance, is expressly provided for by statute. It is made the duty of the court, if the defendant be in custody, to require him "to replevy such judgment by good freehold security; or, in default thereof, to commit such defendant to jail until such security be given." The petitioner is now in execution, according to this statute, and in pursuance of the judgment.

The judgment is affirmed, with costs.

PETTIT, J., dissents.

J. W. Gordon, for appellant.

RETTIG v. PEFFERMAN ET AL.

PRACTICE.—*Bill of Exceptions.*—Where there is no bill of exceptions in the record, and the reasons for a new trial are that the finding is contrary to law, and that the finding is contrary to evidence, such reasons cannot be examined by this court on appeal.

APPEAL from the Miami Circuit Court.

PETTIT, J.—The errors assigned in the case are, first, the

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court erred in its finding and judgment; second, the court erred in refusing the appellant a new trial.

There was a motion for a new trial for the following reasons: first, the finding of the court is contrary to law; second, the finding of the court is contrary to the evidence.

The judgment of the court was for \$110 for the appellees, and sixty days were given to file a bill of exceptions and appeal bond, neither of which is in the transcript; and as no question is raised on the pleadings, and as the evidence is not in the record by bill of exceptions, we cannot say that the court below committed any error, but must presume its action was right.

The judgment is affirmed, with ten per cent. damages and costs.

E. T. Dickey, for appellant.

N. O. Ross and *R. P. Effinger*, for appellees.

DENMAN v. MCMAHIN, ADMINISTRATOR.

IMMATERIAL ERROR.—Where the action is to recover a money judgment, and there is a finding for the defendant, the case will not be reversed because an answer in set-off is defective, when the amount claimed in the set-off is so small that the finding for the defendant could not have been upon that answer.

PRACTICE.—*Duplicity not Demurrable.*—Duplicity in a pleading cannot be presented by a demurrer.

SAME.—*Grounds for New Trial.*—The rulings of a court upon matters of pleading are not causes for a new trial.

EVIDENCE.—*Admissions.*—The admissions of a party may be given in evidence against him, whether connected with any act done or not. These declarations cannot be introduced in his favor.

SAME.—*Proof in Part.*—Where it is necessary for the defendant to show the payment of taxes by him, the admission of a tax receipt is proper, although it does not show who paid the money, as this proof may be supplied by other evidence.

EXECUTORY PROMISE.—*Consideration.*—*Advancement.*—The promise of a father to give up to his son certain notes executed by the latter to the former

37	241
124	236
87	241
135	275

37	241
1169	324

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is a promise which natural love and affection is not a sufficient consideration to support. Nor can it be supported as an advancement of the sum for which the notes were taken from the son.

EVIDENCE.—Admissions.—Admissions are not regarded as the strongest and most satisfactory evidence.

EXECUTORY PROMISE.—Estoppel.—When a father loans money to his son and takes his note for the same, his oral declaration that he will not collect the same, but let the son have it at his death, does not change the transaction into an advancement which the father cannot recall.

PRACTICE.—Interrogatories.—Interrogatories to a jury should be relevant to the matter in controversy.

APPEAL from the Montgomery Common Pleas.

DOWNEY, J.—The appellant filed a claim, consisting of two promissory notes, payable in American gold, against the estate of Moses H. Denman, his deceased son. The administrator answered, first, the general denial, which was afterward withdrawn; second, that the amount of money mentioned in the notes, five hundred dollars, was paid to the deceased by his father as an advancement under an agreement, then made, that the deceased should pay the taxes of the plaintiff on the amount of the notes, and that the note should not be collected, but should, at the death of the plaintiff, be the property of the deceased; that the deceased accordingly paid the taxes during his lifetime, and his administrator was ready still to pay them; that since the contract was made, February, 1857, the plaintiff has become so impaired in mind that he is incapable of business; and that this suit is being prosecuted without his knowledge or consent; third, set-off for forty-four dollars and fifteen cents; fourth, that subsequent to the giving of the notes, the plaintiff agreed with the deceased that he would not require him to pay them, that all he would require of him was to pay to him whatever amount would be necessary to pay the taxes that might be assessed on said amount from year to year during the lifetime of said plaintiff, and that at his death the said notes should not be collected, but should belong to the deceased, and be received as so much of said plaintiff's estate, to which said deceased would be entitled as one of

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his children; that deceased had paid said taxes during his lifetime, for said plaintiff, from the date of said note until the year 1869, was ready and willing to carry out his contract at his decease, and said administrator is still ready to do so.

Separate demurrers to the third and fourth paragraphs of the answer were overruled, and the plaintiff excepted.

Reply by way of traverse. Trial by jury. General verdict for the defendant, and special findings, as follows:

1st. Did the plaintiff loan the deceased, Moses H. Denman, five hundred dollars in American gold at the date of these notes in controversy, and take these notes to secure the payment thereof? Answer. Yes.

2d. Did the plaintiff enter into any contract subsequent to the execution of the notes in suit which was binding on him to discharge the defendant from payment of the same? Answer. Yes.

3d. If any such contract was made, when was it? Answer. In August, 1868, and several times subsequently.

The plaintiff moved the court for a new trial, for reasons which will be hereafter noticed, which motion was overruled, and he excepted, and put the evidence in the record by bill of exceptions.

The errors assigned are, first, that the court erred in overruling the plaintiff's demurrers to the third and fourth paragraphs of the answer; and, second, in refusing to grant a new trial.

The third paragraph of the answer was a set-off for an amount so much less than the amount of the plaintiff's claim, that the jury could not have found for the defendant on that paragraph. For this reason, notwithstanding we regard the paragraph as substantially defective, we cannot reverse the judgment.

The fourth paragraph sets up an alleged contract between the plaintiff and the deceased, made subsequent to the making of the notes, and alleges performance of that contract during the lifetime of the deceased, and readiness on the

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part of the administrator to complete the same. Two objections are urged in the demurrer to this paragraph; first, that it does not state facts sufficient to constitute a defence; and, second, that it contains two distinct causes of defence. The objection based on alleged duplicity could not be raised by demurrer. *Rielay v. Whitcher*, 18 Ind. 458, and case cited. The other objection we need not decide, as the case must be reversed on other grounds, and the answer can be amended.

The first and second reasons assigned for a new trial relate to the action of the court on the demurrers to the paragraphs of the answer. These are no reasons for a new trial.

The third reason is, that the court improperly admitted in evidence the statements of the plaintiff, concerning the notes, unconnected with any act. There is no ground for this objection. The admissions of a party are evidence against him, whether made in connection with an act done or not.

The ninth reason is, that the court refused to allow the plaintiff to prove the declarations of Moses H. Denman, the deceased, made subsequent to the execution and delivery of the notes, and prior to August, 1868, which were offered to prove that the deceased recognized the notes as being a debt he owed, and did not claim the amount secured by them as an advancement. We cannot see any ground on which this ruling can be sustained. One or more of the defendant's witnesses had testified to a conversation by the plaintiff in August, 1868, in which he said that he never intended to collect the notes. But this was no reason for excluding all evidence to the contrary. Under the issue formed by the second paragraph of the answer, which was passed by as sufficient, without being demurred to, and the denial thereof, this proposed evidence was important to the plaintiff, and should have been admitted.

The twelfth reason is the refusal of the court to allow the plaintiff to prove his own statements to the effect that the deceased owed him the amount which the notes called for, and that he was anxious to get the money. There was no error in this. A party cannot, as a general rule, prove his

own statements as evidence for himself. *Scobey v. Armington*, 5 Ind. 514.

The thirteenth reason is the admission of the evidence of Wesley Rountree, who testified that in 1865 the plaintiff told him that some years before he had let the deceased have some money, he thought six hundred and sixty dollars; and that he had told Moses that all the interest he would charge him was to pay the taxes on it, and that it would all belong to him some day, anyhow. It seems to us that this evidence had a tendency to prove the matters set up in the answer, and that it was properly admitted.

The fourteenth reason is the admission of a tax receipt as evidence of the payment of the taxes of the plaintiff. This receipt does not show that the taxes were paid by the deceased, but it shows that they were paid, and other evidence might show that they were paid by the deceased. It was part of the defendant's case to show the payment of the taxes. The genuineness of the receipt was not questioned. It was properly admitted.

The fourth reason relates to the correctness of the first, second, third, fourth, and fifth instructions given by the court at the request of the defendant. We see no objection to the fourth instruction. The first, second, third, and fifth are as follows:

"1. Natural love and affection is a good consideration for a promise or agreement from father to child.

"2. If the jury believe that after the execution of the notes in controversy, the said plaintiff determined to permit the said Moses H. Denman to retain the said money, and that he, said plaintiff, never intended to collect the same while he lived, and so told him, and that after his death the same should be his, the same was an advancement to his said son, and cannot be recovered back in this action.

"3. If the jury believe that the said plaintiff told his son, Moses, that he never intended to collect the said notes, and that he would give up the notes to him whenever he should

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call for them, the same is evidence of a gift, and the said plaintiff cannot afterward collect the same.

"5 Declarations of a person made against his own interest are to be taken most strongly against him, and are regarded the strongest kind of evidence."

We think the first instruction, when applied to the facts of the case, erroneous.

The intention or promise of the father to give up the notes to the deceased, his son, was executory, and natural love and affection are not a sufficient consideration in such a case, whatever may be the case as to executed contracts.

We think that the second instruction was also wrong. Had the notes been delivered to the deceased by his father, the case might fall within the rule in the case of *Sherman v. Sherman*, 3 Ind. 337.

The third instruction cannot be sustained. To make a valid gift, either *causa mortis* or *inter vivos*, there must be a delivery. 2 Kent Com. 438; *Stewart v. Rinker*, 24 Ind. 465.

The fifth instruction should not have been given. The evidence to which the instruction related was simply proof of admissions of the plaintiff. Admissions are not regarded as the strongest or most satisfactory kind of evidence. *Chandler v. Schoonover*, 14 Ind. 324.

The fifth reason for a new trial is, that the court erred in refusing to give instructions four and eight asked by the plaintiff. The fourth instruction was given with a slight modification, which, we think, did not materially change it. The eighth, we think, was properly refused.

The sixth reason for a new trial is, that the court erred in giving, on its own motion, instructions one, two, three and four. The first was as follows: "Although a father may loan to his son a sum of money, and take his note as evidence of the same, he may, by oral declarations, change the indebtedness into an advancement, but this declaration must be made to the son, and be assented to by him; then it becomes an advancement which the father cannot revoke. Evidence of

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such facts should be very clear and satisfactory, as evidence of oral declarations are always to be received with great caution, for reasons heretofore assigned in these instructions."

We are of the opinion that this instruction cannot be sustained. It gives an effect to mere "oral declarations" which we think they cannot have. Wholly unconnected with any act on the part of the plaintiff, or any contract between him and the deceased, they could not have the effect claimed for them. The latter part of the second charge is of a doubtful character. The third seems to be correct. There is no fourth in the record.

The seventh reason for a new trial is the refusal to submit certain interrogatories to the jury, as asked by the plaintiff, to be answered if they found a general verdict, as follows: first, did the plaintiff loan the deceased, Moses H. Denman, five hundred dollars in money at the date of the notes in controversy, and take these notes to secure the repayment thereof? second, are these notes made payable in American gold? third, did the plaintiff do any act that would discharge the defendant from the payment of said notes in American gold? if so, what act was it? and when did he do it? fourth, what amount is due as principal and interest upon these notes in controversy, after deducting the credits to which defendant is entitled?

Instead of submitting these interrogatories, the court submitted those above set out and answered by the jury.

The first interrogatory asked seems to us to have been unnecessary. There was no dispute about the notes having been given for the loan of the amount in American gold, and the general denial had been withdrawn.

The second was wholly useless. The notes, on their face, were payable in American gold. What necessity, then, for a special finding on that point?

The third interrogatory, as to whether the plaintiff did any act, etc., ought not to have been given to the jury. The question was whether the act was done which was alleged in the pleadings, and not some other act. Inter-

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rogatories ought to relate to the questions involved in the issues. They should be "relevant to the matter in controversy." Sec. 303, 2 G. & H. 189.

The fourth might properly have been submitted, but it was the duty of the jury, without any interrogatory, to find the amount due, and as they did not find for the plaintiff, he was not, at all events, harmed by the refusal to give it.

The eighth reason for a new trial is the action of the court in submitting to the jury the interrogatories, which they answered.

The first was useless and harmless.

The second should not have been given to the jury. The answer to it decides nothing in the case. "Did the plaintiff enter into any contract?" A particular contract had been alleged in the answer, and it would have been pertinent if the question had been so framed as to require the jury to find whether that contract was made or not. But by their answer to this interrogatory, it cannot be known whether they, by answering "yes," found that the contract alleged had been made or not.

The third was immaterial, and for the same reason should not have been propounded.

The tenth reason for a new trial is that the verdict of the jury is contrary to law, and the eleventh is that it is not sustained by sufficient evidence. We need not express any opinion on these questions, as the case must go back for another trial.

The judgment is reversed, with costs, and the cause remanded.

J. Buchanan, M. D. White, and T. Patterson, for appellant.
J. M. Butler, for appellee.

The State, *ex rel.* Childers, *v.* Delano *et al.*

• THE STATE, EX REL. CHILDERS, *v.* DELANO ET AL.

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146 372

APPEAL.—*Poor Person.—Bond.*—While it is not decided that an appeal may not be allowed from the judgment of a justice of the peace, by the common pleas court, after the lapse of thirty days, when the party has been prevented by poverty and want of friends from perfecting it sooner, still an appeal bond cannot be dispensed with.

APPEAL from the Marion Common Pleas.

WORDEN, C. J.—The State, upon the relation of Childers, sued Delano and his sureties, upon his official bond as a constable, before a justice of the peace of Marion county, and a trial was had of the cause on the 4th of September, 1868, which resulted in a judgment for costs against the plaintiff, and in favor of the defendants in the action.

Afterward, on the 16th of October, 1868, Childers applied to the court of common pleas for an order for the appeal of said cause, on the ground that he was a poor person, and a stranger in the county, whereby he had been rendered unable to give bond and perfect an appeal in the cause. The court made an order that a transcript of the proceedings in the cause before the justice be sent up, and that Childers be allowed to prosecute the cause as a poor person.

Afterward, the transcript having been filed, the parties appeared, and on the defendants' motion, the appeal was dismissed, because no appeal bond had been filed. The dismissal of the appeal is the particular in which error is supposed to have been committed.

We are not prepared to say that an appeal might not be ordered after the expiration of thirty days, where the party, through poverty and the lack of acquaintance with the community, had not been able to perfect it within the time required. 2 G. & H. 597, sec. 68.

But the question is, can an appeal be ordered in favor of a poor person without any bond at all being given?

Bond is required in all cases of appeal, "except in cases where the same is dispensed with by law." We have no

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statute which in terms dispenses with an appeal bond in cases like the present. If there is any law dispensing with a bond in such case, it is found in construction, and not in the terms of any statute.

The statute providing for the prosecution or defence of suits by poor persons enacts, that "any poor person, not having sufficient means to prosecute or defend an action, may apply to the court in which the action is intended to be brought, or is pending, for leave to prosecute or defend as a poor person. The court, if satisfied that such person has not sufficient means to prosecute or defend the action, shall admit the applicant to prosecute or defend as a poor person, and shall assign him an attorney to defend or prosecute the cause, and all other officers requisite for the prosecution or defence, who shall do their duty therein without taking any fee or reward therefor from such poor person. 2 G. & H. 44, sec. 15.

This statute does not, as we think, dispense with a bond. It simply provides the party with attorneys and other officers requisite for the prosecution or defence of his suit, who are to serve him without fee or reward. It does not furnish officers or witnesses to serve the other party without fee or reward; and if the opposite party recover in the action, he is entitled to recover his costs of the poor person. The poor person is not exempt from the payment of whatever judgment the other party may recover against him, whether for costs or otherwise; and this he is required to do by the conditions of the appeal bond.

We are of opinion that the court committed no error in dismissing the appeal for the reason given.

The judgment is affirmed, with costs.

D. V. Burns and *V. Carter*, for appellant.

N. B. Taylor, for appellees.

FERRENBURG ET AL. v. THE STUDABAKER TURNPIKE COMPANY ET AL.

PRACTICE.—*Assignment of Error.*—The assignment of the reasons for a new trial as error presents no question in the Supreme Court. The overruling of the motion for a new trial should be assigned, simply.

APPEAL from the Delaware Circuit Court.

DOWNEY, J.—This action was brought by the appellants to enjoin the collection of certain assessments of benefits resulting to their lands from the construction of the road of said turnpike company. The county treasurer, who was about to collect the assessments, was made a defendant with the company. The defendants pleaded the general denial, making an issue of fact, which was tried by the court, and there was a finding for the defendants. They moved for a new trial, for various reasons, which need not be more particularly noticed, and their motion was overruled. They excepted, and by a bill of exceptions put the evidence in the record.

Having appealed to this court, they here assign errors, as follows: "The appellants say there is manifest error in the above judgment and proceedings, in this, to wit:

"First, the circuit court found for the defendants, and against the prayer of the plaintiffs, and ordered that the temporary restraining order should be dissolved, when the finding upon the evidence should have been for the plaintiffs, and the restraining order made perpetual.

"Second, the court erred in allowing the defendants, under the general denial pleaded, to introduce the testimony of Isaac Shidler and John Roger, over the objections of plaintiffs, to prove facts tending to constitute an estoppel.

"Third, the court erred in permitting the defendants to prove by parol evidence the time of the meeting of the assessors to make the assessments, over the objection of plaintiffs.

"Fourth, the court erred in permitting defendants to introduce in evidence, over plaintiffs' objection, the record of the commissioners' court, at its June term, 1867, making appoint-

Conner v. Wall.

ment of assessors for the assessment of benefits on said road.

"Fifth, the court erred in permitting the defendants to introduce John Shidler to testify, over plaintiffs' objection, as to plaintiffs living on the line of the road, and having a knowledge of the assessments against them, and as to statements made by plaintiffs.

"Sixth, the court erred in permitting defendants to introduce John Roger to testify, over plaintiffs' objection as to statements and agreements of plaintiffs as to compromise."

It has been a cause of regret to us that so many cases which are brought to this court, on which, frequently, much labor has been bestowed in their preparation, and in some of which error plainly appears, must be disposed of without our being able to reach the merits of the controversy. We have set out in full the assignment of errors in this case, for the purpose of showing how, in many cases, this occurs. In order to bring before us all the questions presented in the motion for a new trial, it was simply necessary for the appellants to say, in the assignment of errors, that the court erred in overruling the motion for a new trial. Instead, however, of doing that, the appellants have, in the assignment, set forth certain reasons for which, if well founded, the court might have granted a new trial, but which present to this court no question whatever. *The Bellefontaine, etc., Railway Co. v. Reed*, 33 Ind. 476; *Lingerman v. Nave*, 31 Ind. 222; *Crowfoot v. Zink*, 30 Ind. 446.

The judgment is affirmed, with costs.

T. S. Waterhouse and J. W. Ryan, for appellants.

C. E. Shipley and W. Brotherton, for appellees.

CONNER v. WALL.

PRACTICE.—*Assignment of Error*.—No question is presented in the Supreme Court by the assignment as error of a reason for a new trial in the court below.

APPEAL from the Hamilton Common Pleas.

WORDEN, C. J.—This was an action by the appellee

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against William W. Conner and John C. Conner upon a promissory note. Finding by the court, and judgment for the plaintiff.

John C. Conner alone appeals, and assigns for error the following only: "Now comes the appellant and says there is manifest error in the record and proceedings, in this, that the finding of the court is not sustained by sufficient evidence."

No authorities need be cited to the point that no question is raised by this assignment of error. The error should have been assigned upon the overruling of a motion for a new trial.

The judgment below is affirmed, with costs.

D. Moss, for appellant.

J. O'Brien and *W. O'Brien*, for appellee.

VEIT ET AL. v. GRAFF.

COUNTY TREASURER.—*Delinquent Taxes*.—The treasurer of a county is not authorized to levy upon personal property for the non-payment of taxes, before the third Monday in March, unless he have such evidence that the debtor is about to leave the county, without payment of his taxes, as would satisfy a jury that he had cause to fear such a course. Any levy by the treasurer before such date, and without sufficient cause, renders him liable for conversion.

APPEAL from the Floyd Circuit Court.

BUSKIRK, J.—This was an action for the wrongful taking and unlawful conversion of personal property. The action was commenced before a justice of the peace, from whose decision an appeal was taken to the circuit court, where the cause was, by the agreement of the parties, submitted to the court for trial, and resulted in a finding for the appellee. A motion for a new trial was overruled, and an exception taken. The property in controversy is a set of chairs. The appellants claim title thereto, under and by virtue of a sale by

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the marshal of the city of New Albany, upon an execution in favor of the appellants, and against William Watkins.

There is no dispute that the appellants obtained a judgment against Watkins; that an execution issued thereon, and was placed in the hands of the said marshal, who levied the same upon the property in controversy; that the same was lawfully sold and purchased by the appellants, to whom the property was delivered.

The appellee justifies his seizure of the property on the grounds, that he was treasurer of Floyd county; that Watkins was delinquent for the taxes of 1865, 1866, 1867, and 1868, and that he levied upon the said property to satisfy, in part, the taxes so owing by the said Watkins. The levy was made by the treasurer on the 2d day of February, 1869. Did the treasurer have the right to make the levy at that time?

Taxes are a lien upon real estate from the 1st day of January. But the lien for taxes does not attach on personal property until the duplicate is delivered to the collector. Secs. 112 and 113, 1 G. & H. 99 and 100; *Barker v. Morton*, 19 Ind. 146. By sec. 78 of the assessment law, 1 G. & H. 94, the county auditor is required, in making out the duplicate for the current year, to add to the taxes for that year "the amount of taxes on all property returned delinquent for any preceding year and remaining unpaid, and a penalty of ten per centum on the amount of such tax."

Sections 93, 94, and 95 point out the manner in which the treasurer shall collect the taxes thus placed upon the duplicate.

Section 96 reads as follows: "In case any person shall refuse or neglect to pay the tax imposed on him, the county treasurer shall, after the third Monday of March, levy the same, together with ten per centum damages, and the costs and charges that may accrue, by distress and sale of the goods and chattels of such person who ought to pay the same, wheresoever the same maybe found within the county."

By section 94, the treasurer is required to attend in the

several townships, between the 15th of October and the 15th of November, and after the 15th of November until the third Monday in March attend at his office, at the county seat, for the purpose of collecting such taxes.

Construing these sections together, it is quite obvious that the treasurer has no authority to make a levy on personal property for taxes before the third Monday of March. This construction is rendered quite certain by section 100 of said act, which reads as follows: "In case the treasurer shall have cause to fear that any person charged with tax is about to remove from the county without payment of his tax, he may, at any time before the third Monday of March, in like manner levy such tax, costs, and charges, by distress and sale."

By section 96, the treasurer is prohibited from making a levy until after the third Monday of March, but by section 100 he may make such levy at any time before the third Monday of March if he "shall have cause to fear that any person charged with tax is about to remove from the county without payment of his tax."

Who is to determine whether the treasurer has cause to fear that a taxpayer is about to remove from the county without the payment of his tax? We think it is to be determined by the court, when the legality of the levy is called in question. When the treasurer makes a levy for taxes before the third Monday of March, he must be prepared to show that the taxpayer, whose property he has levied on, is about to leave the county without the payment of his tax, and if he fails to make such proof, his levy will be held illegal and void. It is only on the condition that the taxpayer is about to remove without the payment of his tax, that the treasurer is authorized to make the levy before the third Monday of March.

It is not enough that the treasurer entertains such a fear, but he must have cause to fear; and it would not be safe to leave to the determination of the treasurer whether he had cause to entertain such fear. It would be liable to great

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abuse. Such a construction would invest the treasurer with an uncontrolled discretion. This is analogous to a proceeding for surety of the peace, attachment, or *ne exeat*. In all of these cases the party must satisfy the court or jury that he had cause to fear that he was in danger of personal violence, or that the debtor was about to abscond from the State, under such circumstances as would authorize a proceeding in attachment or *ne exeat*. "An unauthorized sale of property by a collector of taxes amounts to a conversion, and the owner may maintain trover against him." 2 Hiliard Torts, 272. It was held by this court, in *Mason v. Roe*, 5 Blackf. 98; *Doe v. McQuilkin*, 8 Blackf. 335; and in *McQuilkin v. Doe*, 8 Blackf. 581, that "a sale of land for taxes is not valid unless the land was liable for all the taxes for which it was sold."

The next inquiry is, did the proof, in the case under consideration, show that the appellee had cause to fear that Watkins was about to leave the county without the payment of the taxes charged against him?

There was no proof offered on the subject. It was shown by the evidence that Watkins was assessed for the above named years with five thousand three hundred and seventy-five dollars worth of personal property, of which one thousand seven hundred dollars was for household furniture; that he resided in the city during the years above named; that the treasurer made no effort to collect such taxes by levy and sale of his property, except the property in controversy; that after the levy and sale of the property in question, Watkins stored in the city from three to five hundred dollars' worth of personal property, and that it remained in store for three months, when he removed it; and that during all this time the treasurer made no levy on such property.

But it is claimed that the taxes constituted a lien on the property in controversy, from the time the duplicate was delivered to the treasurer. Conceding that such lien existed, it cannot avail the appellee, for the reason that the time had not arrived for its enforcement, nor is it shown that such a

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state of facts existed prior to such time as authorized him to enforce such lien before the third Monday in March.

We are of the opinion that the appellee showed no valid claim to the property in controversy, and that the court erred in overruling the motion for a new trial.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, and for further proceedings not inconsistent with this opinion.

M. C. Kerr and *T. L. Smith*, for appellants.

KNARR *v.* CONWAY ET AL.

PRACTICE.—*Appeal.*—*Notice to Co-Parties.*—Where all co-parties do not join in an appeal to the Supreme Court, notice must be served on those not joining, and proof thereof must be made, or the court will dismiss the appeal.

APPEAL from the Ripley Circuit Court.

PETTIT, J.—This suit was commenced by George Conway, Isaac Conway, and Fulvia Conway against Lewis Freyer, Henry W. Knarr, John H. Wernike, and Catharine Freyer. The parties were not changed in the court below, but all, plaintiffs and defendants, remained in it to final judgment. Knarr only appeals.

Section 551, 2 G. & H. 270, is as follows: "A part of several co-parties may appeal, but in such case they must serve notice of the appeal upon all the other co-parties, and file the proof thereof with the clerk of the Supreme Court. Unless they appear and decline to join, they shall be regarded as having joined, and shall be liable for their due proportion of the costs. If they decline to join, their names may be struck out, on motion, and they shall not take an appeal

Rittenhouse v. Kemp *et al.*

afterwards, nor shall they derive any benefit from the appeal, unless from the necessity of the case, except persons under legal disabilities." No such notice has been given, or filed with the clerk of this court, and by a long line of numerous decisions of this court, this appeal must be dismissed as not having been properly perfected.

The appeal is dismissed, at the costs of the appellant.

G. Durbin, for appellant.

W. D. Ward and — Cravens, for appellees.

87 258
128 137

RITTENHOUSE v. KEMP ET AL.

PRINCIPAL AND SURETY.—*Release*.—Where a surety on a promissory note, after his release from liability, by an extension of time given to the principal without his consent, receives an indemnity against his liability, without the knowledge of the holder, and subsequently surrenders the same to the principal, he may still avail himself of his discharge.

SAME.—*Indemnity*.—*Return of*.—The fact that the surety returned such indemnity, without the knowledge of the holder of the note, at a date anterior to a new extension of time being given without the consent of the surety, does not render the latter liable, where the holder of the note had no information in regard to the indemnity having been given to the surety when he extended the time of payment.

APPEAL from the Shelby Circuit Court.

DOWNEY, J.—Suit by the appellant against the appellees on the following writing obligatory:

"Twelve months after date we, or either of us, promise to pay Alexander Rittenhouse, or order, the sum of two thousand and two hundred dollars, for value received, without any relief from valuation or appraisement laws whatever.

"DAVID KEMP. [SEAL.]

"December 11th, 1865.

JACOB FOX. [SEAL.]"

Fox answered, separately, first, that he was only security on the obligation for Kemp, which fact was known to Rittenhouse, and that Rittenhouse, by agreement with Kemp,

in consideration of the payment, in advance, of interest at the rate of ten per cent. per annum, extended the day of payment three several times without his knowledge or consent. The first agreement to extend the time is alleged to have been made on the 15th day of March, 1867, until the 31st day of December, 1867; the second on the 28th day of July, 1868, until the 1st day of January, 1869; and the third on the 1st day of March, 1869, for six months from January 1st, 1869.

The second paragraph is the same as the first, except that it alleges the extensions of payment, as follows: the first on the 15th day of March, 1867, from December 11th, 1866, to December 11th, 1867; the second on the 28th day of July, 1868, from December 11th, 1867, until December 11th, 1868; and the third on the 1st day of March, 1869, from December 11th, 1868, until December 11th, 1869. It is alleged that the sum of two hundred dollars was paid by Kemp to Rittenhouse at the date of each agreement, except the last, at which time one hundred dollars was paid, and a like sum agreed to be paid.

The plaintiff met these defences of Fox by pleading, first, the general denial; second, that on the — day of May, 1868, and after Fox became a maker of said note, Kemp delivered to and deposited with Fox, for the purpose of indemnifying and saving harmless said Fox from liability and loss on account of said note, and for the purpose of paying off the same, a certain note dated the — day of —, 1867, and made by William Aiken and others, by which they promised to pay to Hiram Solomon five thousand dollars on or before the 25th day of December, 1868, which note said Solomon assigned to Matilda Kemp, the wife of said David Kemp, on the — day of —, 1868, who afterward handed said note to said David Kemp, to be by him deposited with said Fox as security, and to indemnify him as above stated, and that he, the said Fox, should pay over the proceeds of said note to said plaintiff, in satisfaction of the note on which this suit is brought; and that Kemp did so

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deliver said note to said Fox, who received the same; that said note was, at all times, fully sufficient to indemnify said Fox against the payment of the note sued on, and to pay off and satisfy the same; and that Fox, without the knowledge or consent of the plaintiff, on the 8th day of January, 1869, placed said note in the hands of said David Kemp for collection, and that he afterward, and before the commencement of this suit, received full payment of the same, but that no part of the money had been applied to the payment of the note sued on; wherefore, etc.

A demurrer was filed to the second paragraph of this reply and sustained, and the point was reserved by a proper exception.

Kemp and Fox united in an answer, alleging payment, on which issue was taken by general denial.

There was a trial by the court, finding in favor of Fox, and against Kemp, motion by the plaintiff for a new trial overruled, and judgment on the finding.

But two errors are properly assigned; first, the sustaining of the demurrer to the second paragraph of the reply; and second, the refusal to grant a new trial.

There is no controversy as to the sufficiency of the paragraphs of the answer of Fox.

The whole case resolves itself into the single question as to the sufficiency of the second paragraph of the reply. If that was sufficient to avoid the matters set up in the answer of Fox, then the judgment should be reversed. If not, it should be affirmed. The note of Aiken and others was the property of Mrs. Kemp, but we shall assume, as we think we must, that she, notwithstanding she was a *feme covert*, could legally place it in the hands of her husband, so as to enable him to bind her, by delivering it to Fox as security or indemnity to him, as the surety of her husband, and give him a valid right to collect it from the makers, and apply the proceeds according to the agreement.

It will be seen from the dates given that Mrs. Kemp did not acquire the note of Aiken and others from Solomon

until 1868, and consequently could not have delivered the same to her husband, nor could he have delivered the same to Fox, before that time. Prior to this time, according to the allegations of the answer, and we may as well remark, according to the evidence also, that is to say, on the 15th day of March, 1867, the note having previously matured, the contract was made between Rittenhouse and Kemp, without the knowledge or consent of Fox, for the first extension of the time of payment of the note, and by such extension Fox had been discharged from liability on the note. This gives rise to the question, did the receiving of that note by Fox, after he had been so discharged, revive his liability to the plaintiff, or does it prevent him from setting up the fact of such extension in his discharge?

It is not doubted that a promise by the security, after he has been thus discharged, with a knowledge by him of the discharge, will, without any new consideration, revive his liability. This is established by the following and other authorities: *Fowler v. Brooks*, 13 N. H. 240; *Woodman v. Eastman*, 10 N. H. 359; *The Bank v. Johnson*, 9 Ala. 621; *Thornton v. Wynn*, 12 Wheat. 183; *Creamer v. Perry*, 17 Pick. 332. But in this case, nothing is shown, except the receipt of the collateral, a promise to apply its proceeds to the payment of the debt, and the surrender of the collateral security. No promise by Fox to Rittenhouse to pay the debt is alleged, and we think none can be implied merely from the taking of the note as security under the agreement as alleged. If it had been alleged that Fox knew that the time of payment of the note mentioned in the complaint had been extended, there would have been more reason for contending that the taking of the indemnity by him would have made him liable. Had he not been already discharged before receiving the security, and had he still retained the same, the authorities are numerous that the giving of the time would not have discharged him. *Moore v. Paine*, 12 Wend. 123; *Eastman v. Foster*, 8 Met. 19; *Chilton v. Robbins*, 4 Ala. 223.

But in *Fowler v. Brooks*, *supra*, where, after his discharge,

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by extending the time of payment, the security had taken from the principal two colts and two notes against a third person, for which he gave a receipt engaging to pay that amount on the note in suit, and where afterward this receipt had been given up and a new one given to account for the property on his liabilities as surety for the principal, the court held that these facts did not prevent the surety from setting up his discharge by the extension of the time for payment. PARKER, C. J., who delivered the opinion, said: "But the fact that the surety takes security from the principal, to indemnify him against his liability on the note, without any communication with the creditor, is not a renewal of his promise. It is perfectly consistent with a determination to avail himself of his right to a discharge. It may well be but a wise precaution against the contingency that he may not be able to substantiate his claim to be exonerated from the payment of the debt."

It is settled that the securities held by the surety, to indemnify him against the payment of the debt, are held by him in trust for the payment of the debt, and that the creditor may resort to them for payment of the debt. *Curtis v. Tyler*, 9 Paige, 431; *Green v. Dodge*, 6 Ohio, 80; *Eastman v. Foster*, *supra*.

In *Wilson v. Wheeler*, 29 Vermont, 484, where the surety received from the payee the money for which the note was given, and retained it until one of the principals gave him a note against a third person for his indemnity in so signing, and he then paid it over to the principals; and they afterward made an agreement with the holder of the note, by which he extended the time of its payment, without the consent of the surety, or of the person whose indemnity note he held, it was held that neither the circumstance of the sureties having received the money, nor his holding the indemnifying note, prevented his availing himself, as a surety, of the extension of the time of payment as a discharge of his liability.

But it is alleged that the note of Aiken and others was re-

turned to Kemp, on the 8th day of January, 1869, without the knowledge or consent of the plaintiff; and the answer alleges that the third extension of the time of payment took place on the 1st day of March, 1869, which was at a time when Fox had no indemnity in his hands. The allegation, that the note was returned by Fox to Kemp without the knowledge or consent of the plaintiff, can add nothing to the reply, inasmuch as it is not made to appear that the plaintiff ever knew that the note was held by Fox at any time. The plaintiff could not, therefore, have acted on the supposition that Fox was liable to him, although Kemp might become insolvent, on account of his having in his hands security for the payment of the debt, for it does not appear that he knew of the existence of any such security. It was not, therefore, in this view of the case, any damage to the plaintiff that Fox returned the note to Kemp. *Rankin v. Wilsey*, 17 Iowa, 463; *Smith v. Estate of Steele*, 25 Vt. 427.

We do not decide anything on the question whether or not the plaintiff could avail himself of the promise made by Fox when the note was placed in his hands, that he "should pay over the proceeds of said note to said plaintiff, in satisfaction of the note on which this suit is brought," which is so timidly alleged in the reply. What we do decide is, that the matters set up in the reply do not prevent or estop the defendant Fox from setting up his discharge by the agreements to extend the time of payment of the note in suit, as alleged in the answer.

There is no good reason for saying that the verdict was not supported by the evidence. The note on its face provided for the payment of no interest. The indorsements on the note and the parol evidence show the extensions of the time of payment as alleged in the answers of Fox, and the payment of the ten per cent. interest was a sufficient consideration.

The judgment is affirmed, with costs.*

Major & Major, for appellant.

B. F. Davis and *B. F. Love*, for appellees.

*Petition for a rehearing overruled.

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37	264
128	249
37	264
147	683
37	264
162	8

CROSBY ET AL. v. JEROLOMAN.

STATUTE OF FRAUDS.—*Parol Promise to Answer for Debt of Another.*—G. held a note against S., and J. held a note and mortgage against G., and it was agreed between J. and H. that J. was to surrender to G. the note and mortgage and release him from that indebtedness, and take from him an assignment of the note which he held against S., and H. agreed by parol to pay to J. the latter note. J. accordingly did release the note and mortgage against G. and took an assignment from G. of the note against S.

Held, that the contract was within the statute of frauds, which requires a special promise to answer for the debt of another to be in writing, in order that an action may be maintained thereon.

CONTRACT.—*Joint.*—*Several.*—Where a mortgage executed by one of the members of a partnership in his own name, but for the firm, and upon property held in his own name, but in trust for the firm, contained this agreement: "He assuming the payment of said notes, and they being for the purchase-money for the above described real estate; and the mortgagor expressly agrees to pay the sum of money above described," the notes referred to having been given by another person, and the partnership having purchased an interest in the real estate, and thus assumed their payment;

Held, that the contract was the joint contract only of all the partners, and not the several contract of each.

PLEADING.—*Joint Liability.*—*Former Recovery.*—Where suit had been brought upon the notes and mortgage against the maker of the notes and the member of the firm in whose individual name the mortgage was executed, and judgment only of foreclosure taken against the member of the firm and a personal judgment against the maker of the notes;

Held, that, as judgment on the agreement to pay the notes might have been taken against the partner in that action, the proceedings and judgment taken were a bar to any further suit against him on the contract, and therefore a bar to any suit against his partners, who were only liable jointly with him.

APPEAL from the Cass Circuit Court.

WORDEN, C. J.—This was an action by the appellee against the appellants, and Heman Foster, and Jonathan W. Steele. Issue, trial by the court, and finding and judgment for the plaintiff as against the appellants, Crosby and Welch, and in favor of the defendants Foster and Steele. The parties against whom the plaintiff obtained judgment alone appeal.

The complaint in the cause was in three paragraphs, the first of which alleges in substance, the following facts: that

in April, 1864, the defendant Steele purchased of Lawrence Ginter certain lands described and lying in the counties of Cass and Carroll, in the State of Indiana, and executed to Ginter his individual notes therefor, and took from Ginter a title bond stipulating for a conveyance of the lands upon the payment of the notes; that afterward the defendants Foster, Crosby, and Welch, bought from Steele an interest in the said lands and other property, with which Steele was doing business, and formed a partnership with him under the style of J. W. Steele & Co., of which Steele was the active member; that afterward, the firm being desirous of perfecting their title to the land by procuring a deed from Ginter, it was understood and agreed between the plaintiff, said firm, and Ginter, that three of the notes thus executed by Steele to Ginter, which yet remained unpaid, viz., two for three thousand dollars each, and one for three thousand eight hundred dollars, should be assigned to the plaintiff; that the name of the firm be changed to Heman Foster & Co., and that a deed for the land be made by Ginter to the firm under the name and style of Heman Foster & Co., and the firm were to assume the payment of said notes and execute to the plaintiff a mortgage on the lands, to secure the payment thereof; that in pursuance of the agreement, the plaintiff accepted an assignment of the notes, and Ginter executed a deed for the lands to the firm, and the firm executed a mortgage to the plaintiff on the lands, to secure the payment of the notes. Copies of the notes and mortgage are filed. That by some misunderstanding or mistake, Foster, who had been delegated and authorized to carry out the arrangement and act on behalf of the firm, procured the deed to be made to Heman Foster, instead of Heman Foster & Co., as had been agreed upon, and in like manner he executed to the plaintiff the mortgage in the name of Heman Foster, corresponding with the deed; that Foster represented to the plaintiff, at the time of the execution of the mortgage, that he was acting for the firm, and that the lands had been conveyed to him in trust for the firm, to whom they

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belonged, and not to him individually; that he executed the mortgage on behalf of and as trustee for the firm, and that the obligation in the mortgage to assume the payment of the notes was the obligation of the firm, and not his individual obligation; that his inducement for accepting the obligation was that it was the obligation of the firm, being then informed, and believing, that Foster was insolvent, and that Crosby was the only responsible member of the firm; that afterward the firm consented that the lands be held in the name of Heman Foster, in trust for the firm, and ratified and acquiesced in the execution of the mortgage, and confirmed the same as the act and obligation of the firm, and at different times promised the plaintiff to pay said notes; that the plaintiff has exhausted his remedy against said Steele, and there is yet due and unpaid on said notes the sum of five thousand dollars; wherefore, etc.

The second paragraph alleges the making of the notes by Steele, and their assignment to the plaintiff; that on August 14th, 1865, the defendants were partners, doing business under the firm name and style of Heman Foster & Co., and that for a good and valuable consideration, and, in connection with their partnership business, they did, in writing, assume and undertake and guaranty the payment of said notes, a copy of which written undertaking is set out, being the mortgage described in the first paragraph; that said promise and undertaking was signed by said Foster, in the name of Heman Foster, instead of Heman Foster & Co., but for and in behalf of said firm, and in connection with their business, and as their trustee; that Foster represented to the plaintiff that he was the trustee of the firm, and made said promise in such capacity, and that said obligation was the obligation of the firm, and the plaintiff relied upon the representation, and had no means of knowing the contrary; that all the members of the firm acquiesced in, and ratified said promise, and confirmed the same as the act of the firm, and fully authorized the same before its execution, and confirmed the same afterward; that

there is still due and unpaid four thousand dollars; wherefore, etc.

The third paragraph alleges, that Steele was indebted to Ginter upon the three notes described as in the first paragraph; that Ginter was indebted to the plaintiff in a large amount upon a certain promissory note, and a mortgage upon certain lands purchased of him by Ginter; that the defendants, partners, etc., under the firm name and style of Heman Foster & Co., promised this plaintiff that if he would accept from said Ginter, by assignment, said notes first aforesaid, and release the said Ginter from his said indebtedness on said note and mortgage, the said defendants would assume and pay the said notes given by Steele to Ginter; that in accordance with said agreement, the plaintiff did release Ginter from his said indebtedness and surrender and cancel said note and mortgage, and accept from him by assignment the said Steele notes, which the defendants did assume and promise to pay; that the defendants have frequently since that time acknowledged to the plaintiff their obligation on said notes last named, and promised this plaintiff to pay the same at maturity; that said notes are past due, and as to five thousand dollars thereof remain unpaid; wherefore, etc.

A copy of the notes is made a part of the second and third paragraphs.

The following is the substance of the mortgage executed by Foster, and made an exhibit to the first and second paragraphs of the complaint:

"This indenture witnesseth that I, Heman Foster, of Chicago, Illinois, mortgage and warrant to George M. Jeroloman, of Cass county, Indiana, the following real estate: [description.]

"To secure the payment of three promissory notes [description] all dated April 26th, 1864, payable to the order of L. Ginter, and by him indorsed to said Jeroloman, drawing interest at six per cent, without relief, etc., which notes were given by J. W. Steele to said Ginter for the unpaid purchase-money of said real estate. Said Foster having since their

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execution succeeded said Steele in the ownership of said lands, and the deed being made to him therefor, concurrently herewith, he assuming the payment of said notes, and they being for the unpaid balance of the purchase-money of the above described real estate; and the mortgagor expressly agrees to pay the sum of money above secured, without relief from valuation or appraisement laws, and waive the same upon foreclosure hereof. In witness whereof the mortgagor has hereunto set his hand and seal this 14th day of August, 1865. HEMAN FOSTER." [SEAL.]

The appellants demurred respectively to the first, second, and third paragraphs of the complaint, but the demurrers were overruled, and they excepted.

The defendants filed a joint answer, as follows:

• "They say that the identical mortgage sued upon in the present suit, and which mortgage contains all the promise ever made by any member of said firm to Jeroloman, or on their behalf, if such promise was made, was, on the — day of —, 186—, sued on in this court; Foster and Steele were made parties thereto, and pleaded to the same; issues were thereupon formed; trial was had and judgment rendered; and the plaintiff recovered a judgment of twelve thousand dollars against said Foster and Steele; a complete record of which judgment is filed herewith, and made a part of this answer, including the evidence given in said cause; that the said Jeroloman was fully advised at the time of the alleged facts touching the partnership of said defendants, and knew who composed said firm of H. Foster & Co., as fully then as now. Nevertheless, he did not make Welch and Crosby parties to said suit, but took judgment thereupon; and because said mortgage, if a firm mortgage, is joint and not several, the defendants say that the same has become merged in the judgment taken against Foster and Steele."

The complaint in the cause thus pleaded makes Steele, Foster, and Ginter parties, and after stating the execution of the notes by Steele to Ginter, and their indorsement to Jeroloman, the plaintiff therein, alleges, "that on the 14th day

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of August, 1865, the defendant Heman Foster executed a mortgage to the said plaintiff, on certain real estate described in said mortgage, to secure the payment of said notes, a copy of which mortgage is herewith filed and made a part of this complaint," the same as is in substance above set out. "Plaintiff further says that all of said notes are due, and, together with the interest, wholly unpaid. He therefore demands judgment," etc.

The defendants in that action appeared and answered, and there was final judgment of foreclosure against Foster for a little less than twelve thousand dollars, and a personal judgment against Steele for any balance that might remain after exhausting the mortgaged premises.

A demurrer for the want of sufficient facts was sustained to this paragraph of the answer, and the defendants excepted.

There were other pleadings filed by the defendants, but we have set out sufficient to develop the questions on which the cause must be decided.

We do not understand from the brief of counsel for the appellants that any objection to either the first or second paragraph of the complaint is insisted upon, and therefore no question as to their sufficiency will be considered.

In considering the sufficiency of the second paragraph of the answer, above set out, it becomes necessary to determine whether the third paragraph of the complaint is good; because if the paragraph of the answer be good as to the first and second paragraphs of the complaint, the demurrer thereto should have been overruled if the other paragraph of the complaint be bad. The paragraph of the answer in question was pleaded to the entire complaint. If it sufficiently answered all the good paragraphs of the complaint, it was itself sufficient.

The promise alleged in the third paragraph of the complaint must be taken to have been made by parol, since if it were in writing, the code requires the original or a copy of the writing to be set out. *Harper v. Miller*, 27 Ind. 277.

The case made by the third paragraph of the complaint is,

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in brief, as follows: Ginter held three notes against Steele, and the plaintiff held a note and mortgage against Ginter. It was agreed between the plaintiff and defendants that the plaintiff was to surrender to Ginter the note and mortgage which he held against him and release him from said indebtedness, and take from him an assignment of the notes which he held against Steele, and the defendants were to pay to the plaintiff the latter notes.

The plaintiff accordingly did release his note and mortgage against Ginter, and took an assignment from Ginter of the notes against Steele.

The question arises whether the contract is not within the statute of frauds, which requires any special promise to answer for the debt of another to be in writing, etc., in order that an action may be maintained thereon.

It will be seen that by the arrangement the original debt of Steele was not cancelled. On the contrary, it was continued in full force and the plaintiff took to himself an assignment of the notes against him.

Where the new contract leaves the original debt, which the defendant promises to pay, in full force, the promise is, as a general rule, held to be collateral and within the statute of frauds.

We quote the following passage from a clear and accurate writer, bearing on this subject: "But it was at one time thought that a verbal promise, even to answer for the debt of another for which that other remained liable, might be available if founded on an entirely new consideration conferring a distinct benefit upon the party making such promise. This idea is, however, confuted by Serjt. Williams in his elaborate note to the case of *Forth v. Stanton*. The rule there laid down by him, which has ever since been approved of, is, that the only test and criterion by which to determine whether the promise needs to be in writing, is the question whether it is or is not a promise to answer for a debt, default, or miscarriage of another, for which that other continues liable. If it be so, it must be reduced into writing; nor can the consid-

eration in any case be of importance, except in such cases as *Goodman v. Chase*, in which the consideration to the person giving the promise is something which extinguishes the original debtor's liability." Smith Con. 92. Another elementary writer states the law, in this respect, more briefly, as follows: "In these cases the plaintiff must so shape his case, as not to show or admit in his declaration, or upon the face of the pleadings, that there is a principal debtor liable, and that the promise of the defendant is a promise to pay that debt." Addison Con. 60.

This doctrine is believed to be in accordance with the great weight of English and American authorities. *Tomlinson v. Gell*, 6 Adol. & E. 564; *Green v. Cresswell*, 10 Adol. & E. 453; *Andrews v. Smith*, 2 Crompt., M. & R. 626; *Mallory v. Gillett*, 21 N. Y. 412; *Fullam v. Adams*, 37 Vt. 391; *Curtis v. Brown*, 5 Cush. 488; *Ellison v. Wischart*, 29 Ind. 32.

We are quite well aware that there is some diversity in the decisions upon this point, but the general doctrine is undoubtedly as above stated. There are some cases that seem to stand on ground peculiar to themselves, where a parol promise to answer for the debt of another has been held binding, although the original debt was not extinguished by the new agreement.

It was said in the case of *Fullam v. Adams*, *supra*, which was a very thoroughly considered case, that the court believed it would "be found that in all the cases now regarded as sound, where it has been held that a parol promise to pay the debt of another is binding, the promissor held in his hands funds, securities, or property of the debtor, devoted to the payment of the debt, and his promise to pay attaches upon his obligation or duty growing out of the receipt of such funds."

In the case of *Curtis v. Brown*, *supra*, the court say: "When, by the new promise, the old debt is extinguished, the promise is not within the statute; it is not then a promise to pay the debt of another, which has accrued, but it is an original contract, on good consideration,

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and need not be in writing. But where the original debt still subsists, and where the plaintiff has relinquished no interest or advantage which has inured to the benefit of the defendant, it is not an original contract, but a contract to pay another's debt, and must be in writing."

There is nothing in the allegations, in the paragraph of the complaint under consideration, that takes the case out of the general rule above stated.

This paragraph is spoken of by the counsel for the appellee as setting up a novation. The pleading falls short of this, for the original debt was not extinguished by the new agreement. The extinguishment of the original debt is one of the essentials of a novation. "By the civil law, a novation arose when a new contract was entered into with intent to dissolve a former engagement, or a new debt was substituted for an old one. The old contract or debt was held to be extinguished by the new one contracted in its stead, whence a novation was included by the civilians amongst the different modes in which obligations were extinguished and discharged. 'A novation may take place,' observes Pothier, 'by the intervention of a new creditor, where a debtor, for the purpose of being discharged from liability to his original creditor, by the order of that creditor, contracts a new obligation in favor of a new creditor.' A second kind of novation, observes Pothier, takes place by the intervention of a new debtor, where another person becomes debtor in my stead, and is accepted by the creditor, who discharges me from the original debt. This kind of novation is called expromission. The old debt is here extinguished by the new one contracted in its stead; for which reason a novation is included amongst the different modes in which obligations are discharged." Addison Con. 816.

We must hold that the third paragraph of the complaint was bad, as setting up a parol contract within the statute of frauds; and, therefore, that the demurrer thereto should have been sustained.

We proceed now to consider whether the second paragraph of the answer was sufficient in bar of the first and second paragraphs of the complaint.

The first and second paragraphs of the complaint count upon the mortgage executed by Heman Foster. They assume that the contract contained in the mortgage, and expressed by the words, "he assuming the payment of said notes, and they being for the purchase-money, being the unpaid balance of the purchase-money for the above described real estate; and the mortgagor expressly agrees to pay the sum of money above described, without relief from valuation or appraisement laws, and waive the same on foreclosure hereof," is the contract of all the partners, and not the contract of Foster merely. The appellants insist that, if the contract be regarded as the contract of all the partners, still it is the joint contract of the partners, and not the several contract of each; and, hence, that any judgment that would bar a suit thereon as against any one, would bar it as to all. It seems to be conceded by the appellants that, under the circumstances alleged in the first and second paragraphs of the complaint, all the partners are bound by the contract thus entered into nominally by Foster, and this proposition we shall take for granted. If the contract is to be held as the contract of all the partners, it must be so held on the ground that it is to be read as if Foster had contracted expressly for himself and partners, or on the ground that his partners would, on general principles of law, be liable with him on the contract.

In either view we think the contract joint, and not joint and several. In other words, if the partners, other than Foster, are bound by the contract, they are bound as joint contractors with him, and not as several contractors, each on behalf of himself alone. If the contract is to be read, in view of the circumstances, as if Foster had, in terms, contracted for himself and partners, the case *Ex parte Buckley in re Clarke*, 14 M. & W. 469, is in point, that the con-

tract was joint only, and not joint and several. See, also, *Doty v. Bates*, 11 Johns. 544.

The contract, it will be seen, is in the name of Foster only, and is signed by him alone; and if the partners were all bound thereby, on general principles, as applied to the facts stated, we think it follows, on general principles, that they were only bound jointly with Foster, and not as several contractors.

“Wherever an obligation is undertaken by two or more, or a right given to two or more, it is the general presumption of law that it is a joint obligation or right. Words of express joinder are not necessary for this purpose; but, on the other hand, there should be words of severance, in order to produce a several responsibility, or a several right.” 1 Parsons Con. 11.

It is sometimes said that contracts of partners are joint and several. This, in the broad terms which would include all contracts, is a mistaken view of the law. They may, like any other contract, be so framed as to be joint and several. A recent writer on partnership says: “A partner who enters into a contract on behalf of his firm, is not liable on that contract except as one of the firm; in other words, the contract is not binding on him separately, but only on him and his co-partners jointly. One partner may render himself separately liable by holding himself out as the only member of the firm, or by so framing the contract as to bind himself not only as belonging to the firm, but independently of his connection with it; but unless there are some special circumstances of this sort, a contract which is binding on the firm is at law binding on all the partners jointly and on none of them severally.” 1 Lindley. Part. 369.

Whatever inference to the contrary may be drawn from the case of *Sheehy v. Mandeville*, 6 Cranch, 253, has lost its force, inasmuch as the case has been recently overruled by the court in which it was decided. *Mason v. Eldred*, 6 Wal. 231. In the case last cited, the court say, amongst other things, that “the language of Lord MANSFIELD, in giving

the judgment of the king's bench in *Rice v. Shute*, Burr. 2,611, 'that all contracts with partners are joint and several, and every partner is liable to pay the whole,' must be read in connection with the facts of the case, and when thus read does not warrant the conclusion that the court intended to hold a co-partnership contract the several contract of each co-partner, as well as the joint contract of all the co-partners, in the sense in which these terms are understood by the plaintiff's counsel, but only that the obligation of each co-partner was so far several, that in a suit against him judgment would pass for the whole demand, if the non-joinder of his co-partners was not pleaded in abatement. The plea itself, which, as the court decided, must be interposed in such cases, is inconsistent with the hypothesis of a several liability."

The contract being joint only, if obligatory upon all the partners, it follows that a judgment rendered thereon against Foster, which will bar a further action thereon as against him, will also bar such further action as against the other parties.

The authorities upon this point are now quite numerous, but we deem it unnecessary to refer to them further than to quote the following passage from the opinion of the court in the case of *Mason v. Eldred*, *supra*. The court say: "The general doctrine maintained in England and the United States may be briefly stated. A judgment against one upon a joint contract of several persons, bars an action against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already recovered against

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the latter, who would otherwise be subjected to two suits for the same cause."

Was the suit, pleaded in the answer in question, by the plaintiff against Steele and Foster, a bar to any further action against them, or either of them, on the mortgage? If so, it is a bar to any action thereon against all or any of the partners who are assumed to have been bound by the contract contained therein.

The judgment taken in that action was simply for a foreclosure as against Foster, and a personal judgment was taken against Steele for any residue after exhausting the mortgaged premises. We suppose the personal judgment against Steele was based on the ground that he was liable as the maker of the notes, and not upon any supposed liability on the contract contained in the mortgage.

But the complaint was abundantly sufficient, in that action, to have authorized a personal judgment against Foster on the contract contained in the mortgage to pay the money. The law authorized such personal judgment in connection with the judgment of foreclosure. Sec. 634, 2 G. & H. 294.

Having thus sued upon the mortgage and taken the judgment of foreclosure, can the plaintiff now bring an action on the agreement to pay the money, contained in the mortgage? In other words, can he split up his causes of action and bring two suits upon the same instrument and for the same breach?

We have seen that under the pleadings in the suit of the plaintiff against Steele and Foster, the plaintiff might have taken judgment against Foster on the agreement contained in the mortgage. In the case of *Fischli v. Fischli*, 1 Blackf. 360, it is said that "whenever a matter is adjudicated, and finally determined, by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends; and it therefore prevails, with very few exceptions, throughout the civilized world. This principle not only embraces what ~~was~~ actually was determined, but also extends to every other matter which the parties might have litigated in the case."

In the more recent case of *Embury v. Conner*, 3 N. Y. 511, where many authorities are collected, the court hold the following language: "That the judgment or decree of a court possessing competent jurisdiction, is, as a general rule, final not only as to the subject-matter thereby actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided, can admit of no doubt." See, also, *Duncan v. Holcomb*, 26 Ind. 378.

But, independently of the above proposition, we think it quite clear that a party cannot thus split up his cause of action, and bring two suits upon the same instrument, where the entire remedy could have been had in the first suit. This proposition was thoroughly considered in the case of *Secor v. Sturgis*, 16 N. Y. 548. We quote the following passages from the opinion of the court in that case: "The principle is settled beyond dispute that a judgment concludes the rights of the parties in respect to the cause of action stated in the pleadings on which it is rendered, whether the suit embraces the whole or only part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim, arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such a claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in the other suits. COWEN, J., who delivered the opinion of the court" (in a case cited), "reviews and comments upon many of the cases, after which he makes the following observations: 'I admit that the rule does not extend to several and distinct trespasses or other wrongs, nor, as we have seen, to distinct contracts. It goes against several actions for the same wrong, and against several actions on the same contract.' The true distinction between demands or rights of action which are single and entire, and those which are several and distinct is, that the former immediately arise out of one and the same

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act or contract, and the latter out of different acts or contracts. Perhaps as simple and safe a test as the subject admits of, by which to determine whether a case belongs to one class or the other, is by inquiring whether it rests upon one or several acts or agreements. In the case of torts, each trespass, or conversion, or fraud, gives a right of action, and but a single one, however numerous the items of wrong or damage may be; in respect to contracts, express or implied, each contract affords one and only one cause of action. The case of a contract containing several stipulations, to be performed at different times is no exception; although an action may be maintained upon each stipulation as it is broken, before the time for the performance of the others, the ground of action is the stipulation which is in the nature of a several contract. Where there is an account for goods sold, or labor performed, where money has been lent to or paid for the use of a party at different times, or several items of claim spring in any way from contract, whether one only or separate rights of action exist, will, in each case, depend upon whether the case is covered by one or by separate contracts."

The mortgage in question was an entire contract, stipulating for the payment of the money, and pledging the lands therefor. The plaintiff having brought suit on the mortgage, and taken judgment of foreclosure only, when he might have taken a personal judgment for the residue after exhausting the mortgaged premises, it is clear, under the authorities, that he cannot now maintain another action to recover a personal judgment for such residue. Had the stipulation to pay the money been contained in a separate instrument, so that there would have been more than one contract, a very different question would have been presented.

It follows that the facts set up in the second paragraph of the answer, as above set out, were a good bar to the first and second paragraphs of the complaint, and that the demurrer to that paragraph of the answer should have been overruled.

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The judgment below is reversed, with costs.

D. P. Baldwin, for appellants.

W. Z. Stuart, S. T. McConnell, and M. Winfield, for appellee.

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APPEAL from the Cass Circuit Court.

DOWNEY, J.—Suit by the appellants against the appellee, issue, trial, verdict for the plaintiffs, motion for a new trial made by the plaintiffs overruled, and judgment.

The only error assigned relates to the refusal to grant a new trial. The evidence is not in the record. Certain affidavits used in support of the motion for a new trial are copied into the record by the clerk, but they are not made part of the record by a bill of exceptions. The instructions referred to in the motion for a new trial are not in the record. There is really no question in the record for our decision.

The judgment is affirmed, with costs.

D. P. Baldwin, for appellants.

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EVIDENCE.—*Appeal.—Justice of the Peace.*—In a suit on a premium note given for a policy of insurance, evidence of the want of consideration may be given under the denial put in by the statute, on trial in the court of common pleas, on an appeal from a justice of the peace.

SAME.—*Declarations of Agent.*—In such action, the declarations of the agent, made at the time of making the contract, and relating thereto, are admissible in evidence against the insurance company.

SUNDAY.—*Contract.*—A contract of insurance made on Sunday, and not subsequently ratified, is void.

APPEAL from the Hendricks Common Pleas.

BUSKIRK, J.—This was an action by the appellant against

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the appellee, on a premium note, made payable to the Farmers' Insurance Company. The action originated before a justice of the peace. The case was tried before the justice and in the common pleas, upon the denial put in by the statute. There was a finding in both courts for the appellee. A motion for a new trial was overruled, and an exception taken.

The only error assigned, that we can consider, is based upon the refusal of the court to grant a new trial. All the other errors assigned were reasons for a new trial.

It is claimed that the court admitted over the objection and exception of the appellant incompetent evidence. The evidence objected to was as follows:

The appellee was examined as a witness on his own behalf. He was asked to "state what the agent represented to you when you signed the notes?"

This question was objected to on the grounds, first, that the answer would go to contradict the written instrument; second, that no pleadings are on file in this court in answer to plaintiff's complaint; third, that no agent is shown by the evidence to have been authorized to act for the company.

There is nothing in the first objection. The evidence was admissible to prove the want or failure of consideration, or to show what was the real consideration, or that the execution of the note had been obtained by fraud. *Shirts v. Irons*, 37 Ind. 98.

The second objection is answered by sec. 34 of the Justice's Act, 2 G. & H. 585, which provides that "all matter of defence, except the statute of limitations, set-off, and matter in abatement may be given in evidence without plea; matter in abatement must be pleaded under oath; provided, that the execution of a written instrument, or any assignment thereof, sued on, shall not be denied, except by special plea, verified by affidavit."

It is provided by sec. 67 of said act, 2 G. & H. 596, that a cause on appeal shall be tried under the same rules and regulations prescribed for trials before justices.

An issue good before a justice of the peace is good in the

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circuit or common pleas, on appeal. *Monday v. Utter*, 15 Ind. 447; *Button v. Lent*, 10 Ind. 365; *Chapman v. Clevinger*, 10 Ind. 23; *Kinch v. Weatherall*, 2 Ind. 226; *Weikel v. Probasco*, 7 Ind. 690; *Wire v. Heaston*, 5 Ind. 539.

The third objection, if sustained, would prove too much. If there was no agent authorized to act for the company, we are unable to see how any valid contract could have been made. The declarations of an agent while engaged in the transaction of the business of the principal and relating thereto are admissible in evidence. *Hays v. Hynds*, 28 Ind. 531.

We are of the opinion that the court committed no error in admitting such evidence.

The next question presented for our decision is, whether the finding of the court was contrary to evidence.

The principal defence to the action was that the contract was made on Sunday. The evidence conclusively shows that the appellee signed the application, and executed the notes on Sunday. The parties knew that it was Sunday, and to avoid the illegality of the transaction post-dated the application and the notes some two or three days. There was no evidence tending to show that there was a subsequent ratification of the contract.

The contract was illegal, and, in our opinion, the court committed no error in overruling the motion for a new trial.

The judgment is affirmed, with costs.

P. W. Bartholomew, for appellant.

L. M. Campbell, for appellee.

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PRACTICE.—Amendment of Record.—A record cannot be amended or defects supplied in the Supreme Court by affidavit.

SAME.—Demurrer.—A demurrer to an answer for want of sufficient facts tests the sufficiency of the complaint.

SAME.—Written Instrument.—Exhibit.—Judgment.—In a suit on a judgment, it is not necessary to make a copy of the judgment an exhibit to the complaint.

37	281.
135	47
37	281
140	160

Lytle v. Lytle *et al.*

ATTACHMENT.—*Issue Between Attaching Creditors.*—An attaching creditor may contest the claim of other attaching creditors, where the defendant does not appear and defend.

JUDGMENT.—*Presumption of Defendant's Appearance.*—In a suit upon a judgment for alimony in a divorce proceeding, the appearance of the judgment defendant in said proceeding for a divorce will be presumed until the contrary appear.

APPEAL from the Henry Circuit Court.

DOWNEY, J.—Certain of the appellees sued William Lytle, and attached his property, he being a non-resident of the State. The appellant filed a claim under this attachment, being a judgment in her favor for alimony, in a divorce case, against her husband, the said William Lytle. She did not file any transcript of the record in the case for divorce and alimony, with her complaint, but her complaint was held good on demurrer. The attaching creditors answered that no notice of the suit for divorce and alimony was given to the defendant therein, other than "by publication upon affidavit made by her that said William Lytle was a non-resident of the State of Indiana." Mrs. Lytle demurred to this answer, and her demurrer was overruled, and the answer held a bar to her claim. Refusing to reply to the answer, judgment was rendered against her, from which she appeals, and assigns for error that the court improperly overruled the demurrer to the answer.

It is attempted by affidavit, in this court, to show that a copy of the judgment in the divorce and alimony case was filed with the complaint, but we think the record cannot be corrected, or defects in it supplied, in this court, in this manner. If such practice could be allowed, we could not find from the affidavit that the copy was filed, for it does not state that fact. In order that the court may know that a written instrument or copy is filed with the pleading, as constituting the foundation thereof, it should be identified by reference to it and making it an exhibit. *The Peoria, etc., Co. v. Walser*, 22 Ind. 73.

The sufficiency of the complaint in this case is brought in question by the demurrer to the answer; for if the complaint

was bad, the issue on the demurrer to the answer was properly determined against the party demurring. We think, however, that the court committed no error in holding the complaint good as against the objection made to it. It is true that it has been repeatedly decided by this court, that it is necessary in bringing an action upon a judgment, or in setting up a judgment as a defence or by way of reply, that a copy of the judgment shall be filed with the pleading; and these rulings have been based on 2 G. & H. 104, sec. 78, which provides, that "when any pleading is founded on a written instrument or on account, the original, or a copy thereof, must be filed with the pleading," etc.; but, after mature consideration, we have come to the conclusion that a proper construction of that section of the code, and a regard for convenience and economy in practice, require us to hold that a judgment is not a "written instrument" within the meaning of that section. Deeds, mortgages, bonds, written contracts, promissory notes, bills of exchange, etc., are written instruments. Judgments are in writing, but are not usually called written instruments. The legislature, in framing and enacting the section, evidently had in view only instruments of which "the original, or a copy," might be filed, as the party might elect. The original of a judgment cannot be filed. It is frequently the case that the judgment which is pleaded is a judgment of a court of the same county, and often it is a judgment of the same court in which the pleading is filed. In such cases it is unnecessarily inconvenient and expensive to the party to be compelled to procure a transcript of the record pleaded, which must be a complete record, to be filed with the pleading. If the record is of the court of another county in the State, or of a foreign state, the party pleading it will, of course, have to obtain a copy as evidence, whether it be filed with the pleading or not. It results from this ruling that the case of *Reasor v. Raney*, 14 Ind. 441; *Norris v. Amos*, 15 Ind. 365, and other cases following them, are overruled. This new construction of the section in question can work no harm to any one in cases already disposed of

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in the subordinate courts, for any pleading which would have been good under the former construction should be good under the view of the section which we have taken.

The next question made is, as to the right of the attaching creditors to question the validity of the claim of Mrs. Lytle. This point is decided against the appellant in *The U. S. Express Co. v. Lucas*, 36 Ind. 361.

The third question discussed is, whether a judgment for alimony in a divorce case, where there has been no other notice than by publication in a newspaper, the defendant having been a non-resident of the State, and not having appeared to the action, will constitute a legal cause of action in another suit against the defendant.

This question was answered in the negative in *Beard v. Beard*, 21 Ind. 321, and apparently the other way in *Farr v. Buckner*, 32 Ind. 382.

In the case at bar, we think the question is not presented. As will be seen from the quotation made by us from the answer, it is not shown in this case that the defendant, in the suit for divorce and alimony, did not appear in that action. We must presume, in favor of the judgment, that he did appear, at least until the contrary shall be shown.

For this reason, the demurrer to the answer should have been sustained by the circuit court.

The judgment is reversed, with costs, and the cause remanded.

L. and W. O. Sexton, for appellant.

J. Brown and R. L. Polk, for appellees.

HAMLYN ET UX. v. NESBIT, Adm'r.

DECEDENTS' ESTATES.—*Appeal*.—Section 189 of the act for the settlement of decedents' estates is in force, except so far as it authorizes a writ of error. The party aggrieved has his election to appeal from the common pleas court to the circuit court, in any matter connected with the decedent's estate, or

37	284
124	544
37	284
132	356

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under section 550 of the code, to the Supreme Court. If appealed to the circuit court, the case is tried *de novo*, and if there are issues of fact, they may be tried by a jury.

SAME.—Trial.—Burden of Issue.—Where the administrator had reported, and exceptions were taken to his report, and the administrator charged that the decedent had made unequal advancements to the heirs, and this was denied, and an appeal was taken to the circuit court;

Held, that the administrator was entitled to have the open and close on the trial.

SAME.—Witness.—Evidence.—The administrator is a competent witness on such trial. The wife of one of the co-plaintiffs, the real party in interest, cannot be a witness. Nor can the declarations of the ancestor, made long after the supposed payment or advancements to his children, be proved for the purpose of establishing the fact that such payments or advancements were made.

APPEAL from the Franklin Circuit Court.

BUSKIRK, J.—In 1863, letters of administration on the estate of Thomas Nesbit, Sr., deceased, were granted to James Nesbit and Thomas Nesbit, Jr., by the common pleas court of Franklin county. Proceedings were continued in said court up to 1867, when a citation issued requiring the administrators to appear and settle. Prior to the issuing of the citation, the administrators had filed in the clerk's office their first account current, and after the issuing of said citation, they filed their final account current and final settlement of said estate.

The appellants, Hamlyn and wife, she being a daughter and heir of the decedent, appeared in the court of common pleas and filed exceptions to the accounts. Issues were formed on the exceptions, and were heard and tried by the court, and resulted in a finding that there was still due Mrs. Hamlyn five hundred and twelve dollars and seventy-five cents, which the administrators were required to pay. The court overruled a motion for a new trial, and rendered a judgment on the finding. The administrators appealed the case to the circuit court. In the circuit court, the appellants moved to dismiss the action for the reason that that court had no jurisdiction of the case, which motion was overruled, and an exception was taken. The circuit court retained jurisdiction of the cause, and it was tried *de novo* and by a jury, resulting in a general and special verdict. The appel-

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lants moved for a new trial, which was overruled, and final judgment was rendered on the verdicts. It should be noted that Thomas Nesbit, Jr., one of the administrators, appeared in the circuit court and filed a paper to the effect that he was satisfied with the judgment of the common pleas court; that he had not taken an appeal, or authorized an appeal to be taken in his name, and that he desired the appeal to be dismissed, so far as he was concerned. Thereupon, the appeal was dismissed as to him. The appellants have assigned eight errors. The first one is based upon the action of the circuit court in overruling the motion of the appellants to dismiss the action for the want of jurisdiction.

Did the circuit court have jurisdiction of the cause?

It is claimed that section 189 of the act for the settlement of decedents' estates gave the appellee an appeal from the common pleas to the circuit court, and conferred jurisdiction on the latter court. That section reads as follows:

"Sec. 189. Any person considering himself aggrieved by any decision of a court of common pleas growing out of any matter connected with the decedent's estate, may prosecute a writ of error or appeal to the circuit or Supreme Court, upon filing with the clerk of such court of common pleas, a bond with penalty in double the sum in controversy, in cases where an amount of money is involved, or where there is none, in a reasonable sum, to be designated by such clerk, with sufficient surety, payable to the opposite party in such appeal, conditioned for the diligent prosecution of such appeal, and the payment of all costs, if costs be adjudged against the appellant."

It is claimed by the appellants that the above quoted section was repealed, by implication, by section 550 of the code. 2 G. & H. 269.

Section 550 reads as follows: "Writs of error are hereby abolished. Appeals may be taken from the courts of common pleas and the circuit courts, to the Supreme Court, by either party, from all final judgments, except in actions originating before a justice of the peace, or mayor of a

city, where the amount in controversy, exclusive of interest and costs, does not exceed ten dollars. The party obtaining judgment shall not take an appeal after receiving any money paid or collected thereon."

This presents for our decision the naked question of whether section 189 of the act for the settlement of decedents' estates was repealed, by implication, by the subsequent passage of the code. The law does not favor the repeal of statutes by implication, but requires clearly repugnant language to effect the repeal.

This court, in *Simington v. The State*, 5 Ind. 479, in discussing the question of repeal by implication, uses this language: "Where the words in the different sections or acts are susceptible of a construction which would carry out the spirit of the law, and both be permitted to stand, the rules of construction may be profitably used; but where the language is so repugnant as necessarily to destroy the meaning of one of the provisions, that which is last enacted must prevail."

The precise question, in principle, which is under consideration, was involved in the case of *Henry v. Henry*, 13 Ind. 250. Sec. 43 of the act providing who may make a will, etc., gave an appeal from the common pleas to the circuit court. It was maintained that the above section was repealed by the adoption of the code. The court say: "It is also claimed that the provision in question is repealed by the general law, passed subsequently, authorizing appeals to the Supreme Court from the common pleas and circuit courts. 2 G. & H. 269. This position, we think, is not tenable. There is no inconsistency in these statutes. They may both stand and have full effect. The act concerning wills provides, that 'any party aggrieved by the decision of such court' (of common pleas) 'may appeal therefrom to the circuit court of the proper county,' etc. The other provides, that 'appeals may be taken from the courts of common pleas and the circuit courts to the Supreme Court, by either party, from all final judgments, except,' etc.

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“Here is nothing limiting or taking away the right of appeal from the common pleas to the circuit court, in cases of contest of wills. Under these provisions, a party in such case may appeal either to the circuit or Supreme Court in all cases of final judgment.”

The principle enunciated in the above case applies to the case under consideration. The cases, in principle, are identical. The same rule of construction should apply to both. We are, therefore, of the opinion, that the passage of the code did not repeal by implication section 189 of the act for the settlement of decedents' estates.

Section 550 of the code, in express terms, abolishes “writs of error.” This repeals, by implication, so much of section 189, as gives the right to prosecute a writ of error. There is a clear repugnancy between the two. The party aggrieved has the election to appeal to the circuit court, under section 189 of the act for the settlement of decedents' estates, or to appeal to the Supreme Court under section 550 of the code. 2 G. & H. 269.

It is also insisted that the court erred in trying the case *de novo*. It is claimed that if a right of appeal existed to the circuit court, that court should act as a court of error. In other words, that the case in the circuit court should have been decided upon errors assigned in the record. We think otherwise. There is no law conferring upon the circuit court revisory jurisdiction. Section 189 was evidently enacted in view of existing laws. Section 20 of the act creating the court of common pleas provides, that “all appeals, whether in civil or criminal cases, shall stand for trial in the circuit court on the papers and pleadings filed by the parties in the common pleas; *Provided*, that either party may amend on such terms as to costs, as the law or the rules of such circuit court may prescribe.”

It was held by this court in *Weutherly v. Higgins*, 6 Ind. 73, that “it was evidently the intention of sec. 20, p. 19, 2 R. S., that such appeals should stand for trial on their merits in the circuit court.”

The above section was repealed by acts of 1853, p. 48, but the law creating the court of common pleas was approved May 14th, 1852, and was consequently in force when section 189 was passed.

In our opinion, the court committed no error in trying the case on its merits.

It is also contended that the court erred in holding that the appellee had the right to demand a trial by jury, and in permitting a trial by jury.

The administrators filed their account current and final settlement sheet. The appellants filed exceptions to the confirmation of the final settlement sheet, and demanded of the court to have the same corrected in six particulars. First, that their charge for services was excessive; second, that the sum paid to their attorney was too much; third, that they had failed to charge themselves with all the money they had collected from T. A. Goodwin; fourth, that they had failed to account for certain personal property; fifth, that they had not accounted for all the money they had collected from Francis Kirk; sixth, that they had claimed credit for money paid for taxes on the estate, that should have been paid by them as individuals.

The administrators answered in five paragraphs. The first being the general denial; the second was stricken out on motion, and a demurrer was sustained to the fifth. The appellants replied by a denial to the third and fourth paragraphs.

The appellants also asked and obtained an order from the court requiring the administrators to make and file an exhibit, showing the basis and manner in which they make distribution among the heirs. The administrators filed the exhibit in which they charged that the decedent had made advancements to his heirs in unequal proportions. This was denied by the appellants. There was involved in the case the liability of the estate to pay certain claims, whether the administrators had failed to charge themselves with certain sums of

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money and articles of personal property, and the question of advancements to the heirs.

Section 188 (2 G. & H. 535) of the act for the settlement of decedents' estates provides, that "trials by jury shall be allowed at the request of any party in all cases where there is an issue of fact; and in any such case, the court shall direct the sheriff to summon a jury of twelve householders of the county, unless the party demanding a jury consent to a less number; and in all such trials, such court and jury shall be governed by the same regulations, not inconsistent with this act, as are provided in the case of trials in the circuit court."

See *Lake Erie, etc., R. R. Co. v. Heath*, 9 Ind. 558; *Shaw v. Kent*, 11 Ind. 80; *Clem v. Durham*, 14 Ind. 263; *Cowgill v. Wooden*, 2 Blackf. 332.

It is quite clear to us, that either of the parties had the right to demand a trial by jury, and that the court committed no error in permitting the "issues of fact" to be tried by a jury.

It is also maintained by the appellants, that the court erred in deciding that the burden of the issue was upon the appellee, and that he had the right to begin and close the evidence, and the right to open and close the argument.

The final settlement of the accounts of executors and administrators is considered *prima facie* correct. *Ray v. Doughty*, 4 Blackf. 115. The appellants filed their exceptions against the report of the administrators, in which they charged that the same was incorrect in several respects. These allegations were denied by the administrators. The administrators also charged that the decedent had made unequal advancements to his heirs. This was denied by the appellants. Two issues were formed. The burden of the issue was upon the appellants in the first issue, and upon the appellee on the second.

The general rule is, that the party on whom the affirmative of an issue lies has the right to begin and conclude. *Kimble v. Adair*, 2 Blackf. 320; *Marquis v. Rogers*, 8 Blackf. 118; *Jackson v. Pittsford*, 8 Blackf. 194; *Burroughs v. Hunt*,

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13 Ind. 178; *Hannum v. Curtis*, 13 Ind. 206; *Ashing v. Miles*, 16 Ind. 329; *Starr v. Hunt*, 25 Ind. 313. The right to open and close belongs to the party upon whom rests the burden of proof. *Hand v. Taylor*, 4 Ind. 409; *Moore v. Allen*, 5 Ind. 521; *Gaul v. Fleming*, 10 Ind. 253; *List v. Kortepeter*, 26 Ind. 27.

Where there are several issues, and the proof of one of them lies on the plaintiff, he is to begin. *Jackson v. Pittsford*, 8 Blackf. 194; *Bowen v. Spears*, 20 Ind. 146.

Where the plaintiff is required to introduce any evidence to establish his right to a judgment, or to show how much he should recover beyond a mere nominal amount, he is entitled to open and close. *The City of Aurora v. Cobb*, 21 Ind. 492; *Fetters v. The Muncie National Bank*, 34 Ind. 251.

A majority of the court are of the opinion, that in the case under consideration, the administrators were required to establish the correctness of their report, in respect to such matters as were embraced in the exceptions filed by the appellants, and that this placed the burden of the proof on them, and gave them the right to begin and conclude the evidence, and to open and close the argument.

The writer of this opinion is constrained to differ with his brethren on this point. The administrators were charged with the performance of important public duties. They acted under oath. They were required to submit to the court their report, under oath, accompanied by the vouchers, as evidence of the disbursements made by them out of said estate. This duty they performed. The appellants filed exceptions to the confirmation of such report. The appellants admitted that the report was correct, except in reference to those matters which were charged to be incorrect. The administrators having filed their final account, under oath, and accompanied the same with vouchers evidencing the correctness of their disbursements, the writer is of the opinion that if the appellants had failed to offer proof impeaching the correctness of the report, and sustaining the truth of their exceptions,

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it would have been the duty of the court to have approved and confirmed the report. This would have conformed to the pleadings. The appellant filed exceptions. The appellee filed an answer, to which the appellant replied.

It is the opinion of the writer that this is no longer an open question in this court. The precise question, in his opinion, involved here was decided by this court in *The Evansville and Crawfordsville R. R. Co. v. Miller*, 30 Ind. 209. That was a proceeding to condemn lands for public use. The damages were assessed, as provided by the charter of the company. Miller, being dissatisfied with the amount allowed him, filed his exceptions and took the case to the circuit court for review, as provided in the charter, where he demanded a jury trial, which was granted. He demanded, and the court granted him, the right to begin and conclude the evidence, and to open and close the argument. On appeal here, this was assigned for error. This court held that the lower court had committed no error; that the burden of the issue rested on Miller; and that he was bound to make good his exceptions.

Can there be any greater force or validity in the report of the appraisers than there is in the report of the administrators? There can be no presumption indulged in favor of the correctness of the report of the appraisers, that will not apply with as great force to the report of the administrators, made under oath, and supported and sustained by the vouchers filed and constituting a part thereof.

It is also claimed by the appellants, that the court erred in permitting the administrators to testify as witnesses on the trial of the cause. We do not think so. We do not think that this comes within either the letter or spirit of the law. The proviso relied upon is as follows: "Provided, that in all suits where an executor, administrator, or guardian is a party in a case where a judgment may be rendered either for or against the estate represented by such executor, administrator, or guardian, neither party shall be allowed to testify

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as a witness, unless required by the opposite party, or by the court trying the cause, except," etc.

The object of this proviso was to protect the estates of decedents from unjust demands on the part of the living. The mouth of the decedent being closed by death, the law closes the lips of the living.

The principal question involved in the case under consideration affected the distribution of the surplus. There could not have been a judgment either for or against the estate. We entirely approve of the construction placed upon the above proviso by this court in *Shaffer v. Richardson's Adm'r*, 27 Ind. 122.

This case does not come within the spirit of the above proviso, for the reason that nearly all of the disputed questions of fact occurred subsequent to the death of the decedent, and the testimony of the parties was not, therefore, subject to the objection that the living was swearing against the dead.

We are of the opinion that the court committed no error in permitting the parties to testify.

It is also claimed by the appellants, that the court erred in excluding James Hamlyn as a witness, on the ground that he was the husband of his co-plaintiff, Nancy Hamlyn, who was the real plaintiff in this proceeding.

According to the ruling of this court, in the well considered case of *Rush v. Megee*, 36 Ind. 69, he was incompetent, and the court committed no error in excluding his evidence.

The next error relied upon by the appellants is, that the court erred in overruling the motion of the appellants to suppress the deposition of Daniel Port. No objection to the deposition was pointed out in the court below, or in this court. The ruling of the court is presumed to be correct.

It is also claimed that the court erred in permitting James Nesbit, the appellee, to testify to declarations made by the decedent, in regard to payments or advancements made by him to his children, long after the said payments or advancements were said to have been made.

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We do not deem it necessary to enter into any extended examination of the law on this point, for the reason that we are of the opinion that this court, in the well considered case of *Woolery v. Woolery*, 29 Ind. 249, laid down the correct rule on this subject; and upon another trial, the court can determine the question of the admissibility of evidence on this point, in accordance with the ruling in the above case.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

C. C. Binkley, for appellants.

H. C. Hanna and *F. Swift*, for appellee.

THE CITY OF COLUMBUS ET AL. v. THE COLUMBUS AND SHELBY
RAILROAD COMPANY.

RAILROAD.—*Right of Way Through Streets in City.—Abandonment.*—The Columbus and Shelby Railroad Company procured a right of way to run from the track of the Madison and Indianapolis Railroad Company, through the streets of the city of Columbus, toward Shelbyville, and subsequently, under a running arrangement with said Madison and Indianapolis Railroad Company, gave the control of its road to that company, and, by that company, and with the consent of the Columbus and Shelby Company (the track through the streets still remaining), the road superstructure of the Columbus and Shelby Company adjoining the city was removed for the distance of a mile beyond the city, and the remaining track to Shelbyville was connected with the road of the Madison and Indianapolis Railroad Company around said city, through lands, with the owner of which the latter company contracted to procure a release for him from the Columbus and Shelby Company of the right of way over the land where the superstructure was removed.

Held, that this did not constitute an abandonment of the right of the Columbus and Shelby Railroad Company to maintain a track through the streets of Columbus.

APPEAL from the Bartholomew Common Pleas.

DOWNEY, J.—This action was commenced by the appellee against the appellants, and its object was to obtain injunctive

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relief. The facts stated in the complaint, condensed as much as possible, are as follows: In 1853, the Columbus and Shelby Railroad Company was organized to construct a railroad from Columbus to Shelbyville. For the consideration of three hundred dollars, the town of Columbus granted to the railroad company the right of way from the road of the Madison and Indianapolis Company along and across the streets of the town, in the direction of Shelbyville; and under this grant the Columbus and Shelby Railroad Company constructed and for many years used its track. In 1862, the Madison and Indianapolis Railroad Company, having been sold, was reorganized as the Indianapolis and Madison Railroad Company. In 1866, the Indianapolis and Madison Railroad Company and the Jeffersonville Railroad Company were consolidated, and became the Jeffersonville, Madison, and Indianapolis Railroad Company. Before this consolidation, a running arrangement had been made between the Indianapolis and Madison Railroad Company and the Columbus and Shelby Railroad Company, which arrangement was renewed and continued between the Jeffersonville, Madison, and Indianapolis Railroad Company and the Columbus and Shelby Railroad Company. In 1869, the Jeffersonville, Madison, and Indianapolis Railroad Company constructed a track of its own, diverging from the line of its road at a point further north, and intersecting the track of the Columbus and Shelby road at a point three-fourths of a mile northeast of Columbus, and, without the consent of the appellee, removed the rails from the track of appellee's road between the corporation line and said point of intersection, and put them down on said new track, and agreed with the owner of the land over which that part of said road ran to procure from appellee a release to him of the right of way. On the 14th of October, 1869, the common council of the city of Columbus passed an ordinance, by which it declared the track of appellee over, along, and across said streets to be a nuisance, and directed the marshal of the city to remove the same, etc., if not taken up by the Jeffersonville, Madison,

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and Indianapolis Railroad Company within ten days, etc. There was a second paragraph of the complaint, but it need not be separately noticed.

The first step taken by the defendants was to move the court to require the plaintiff to make the complaint more specific. This motion was overruled, and this action of the court is assigned as error. But the question is not in the record. No bill of exceptions was filed, and we cannot, therefore, know what were the grounds of the motion, or that it was not properly overruled. The defendants then answered by a general denial, which was afterward withdrawn; and, second, as follows:

“That appellee, in 1853, organized under the general law, and immediately thereafter procured a release of right of way over said streets, from the then town of Columbus, without consideration, and solely for their principal line of road, without any switch thereon, and to be so maintained by appellee; that the road was so built and operated for some time, until an arrangement was made by appellee with the Madison and Indianapolis Railroad Company, whereby the entire management and control of appellee's road passed into the hands of the Madison and Indianapolis Company, who continually, until May 1st, 1866, operated and controlled the same, the Columbus and Shelby Company, during said time, not participating at all therein, and running no trains thereon, but by the terms of said arrangement, transferred to said Madison and Indianapolis Company all right, power, and control over said road, with full power to make all changes in the line or route thereof, which said Columbus and Shelby Company possessed; that on May 1st, 1866, the Madison and Indianapolis Company and Jeffersonville Company consolidated, forming the Jeffersonville, Madison, and Indianapolis Company, which became the owner of all the rights, privileges, and franchises of said two companies, including said rights of said Indianapolis and Madison Company in said appellee's road; that immediately after said consolidation, an arrangement was effected between appellee

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and said consolidated company, similar to the one existing with the Madison and Indianapolis Company, as above set forth, and giving like control to the consolidated company over appellee's road, which said Jeffersonville, Madison, and Indianapolis Company has ever since exercised, placing thereon their own rolling stock, making time tables, selling passenger tickets, contracting for freights, and keeping the track in repair, all in the name and by authority of the officers of the Jeffersonville, Madison, and Indianapolis Company; and under said arrangement and power of control, said Jeffersonville, Madison, and Indianapolis Company have removed switches and side tracks, and laid down others, removed and torn down depots, and built others, all to the exclusion of acts of management by appellee, and have also built a road from Shelbyville to Cambridge City; that in 1869, a new road was constructed so as to leave the old line of the Jeffersonville Railroad and connect with the Columbus and Shelby Railroad at a point north-east of Columbus, the particulars of which are shown substantially as set forth in complaint and accompanying plat; that the new route, for a part of the way, ran over land of Francis T. Crump, son of Francis, J., and, to secure the right of way over land of the son, an agreement was made with the father and son, by the Jeffersonville, Madison, and Indianapolis Company, to take up the old track through the father's land, and abandon and surrender their right of way therein; pursuant to which arrangement said Jeffersonville, Madison, and Indianapolis Company took up and removed the track and superstructure between the north line of Columbus and the point of intersection, and Francis J. Crump has taken possession thereof, and plowed and cultivated the same; that by said removal, a gap of about a mile has been made in appellee's road; that no trains have or can run over the original line since; that a portion of said road—about one-half of a mile long—is within the city limits of Columbus, entirely cut off from any portion of said road, which is being used as a switch or side track for the Indianapolis and Madison part of said con-

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solidated road, and can be used for no other purpose without reconstructing said removed portion; that it is, and long has been, the constant practice of said Jeffersonville, Madison, and Indianapolis Company to back or run trains of hogs and other freight, and permit them to stand on said track and street for a day at a time, to the great hindrance of passengers, and annoyance of citizens on said street, which is one of the most important in the city, closely built up on both sides with dwelling-houses; that said track, if used as the main or principal track of appellee's road, would be but slightly inconvenient, as only two trains each way ever run over said road per day, but as now used, blocked up with cars and locomotives standing thereon, is a great annoyance and inconvenience; that appellee has, at no time prior to this action, objected to, or dissented from, the act of said Jeffersonville, Madison, and Indianapolis Company in taking up said track, or making said arrangement with Crump for the surrender of said right of way, all which acts of removal and abandonment were with full knowledge and consent of said appellee and the officers who swore to the complaint, who are charged to be directors of appellee, and also with the knowledge of all other directors of appellee, who have never objected thereto, and also with the knowledge of the president and other managing agents thereof; that with full knowledge of said change, and all acts aforesaid relating thereto, appellee fully ratified and confirmed the same."

There was a demurrer to this paragraph of the answer, for the reason that it did not state facts sufficient to constitute a defence to the action. This demurrer was sustained, and the defendants declining to amend, final judgment was rendered for the plaintiff, by which the defendants were enjoined from removing the said track, etc.

The second and third assignments of error are, that the court improperly overruled the demurrers of the defendants to the first and second paragraphs of the complaint. These demurrers are not in the record, and we cannot, therefore, tell

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what objections they raised to the complaint, or whether they were correctly overruled or not. We must presume they were correctly overruled.

The only question properly presented to us is that relating to the action of the court in sustaining the demurrer to the second paragraph of the answer.

As this paragraph alleges that the acts done by the Jeffersonville, Madison, and Indianapolis Railroad Company were done "with the full knowledge and consent of the appellee," it only remains to be determined whether the alleged acts amount to an abandonment of the right of way of that part of the original track of the appellee which lies on, along, and across the streets of the city. The question is not whether the Jeffersonville, Madison, and Indianapolis Company has made an unauthorized use of the track by converting it into a switch, and by using it as a place to leave its cars to the obstruction of the streets and the annoyance of the citizens. This would hardly justify the tearing up of the track, whatever other remedy it might afford the injured parties.

Do the acts alleged in the second paragraph show an abandonment of the right of way? It is not claimed that the company has abandoned the use of that part of the track in question, but it is insisted that the taking up of the rails at a point outside of the city, the transferring of them to the new track, and the promise to procure a release of the right which the company had to the way from which the rails have been removed, thus making it for the present, at least, impossible to use the track, as it originally was, continuously from the Jeffersonville, Madison, and Indianapolis road to Shelbyville, on account of the gap thus made, and indicating by the agreement to procure a release of the right of way an intention to make this arrangement permanent, is an implied abandonment, or operates as an abandonment, of the part in question. But it is urged by the appellee that the running arrangement with the Jeffersonville, Madison, and Indianapolis Company may, for aught that appears, at any time terminate this arrangement, and as that company owns the new tracks, that

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it may at once assert this right, and thus leave the appellee without any track on which to run its cars, so far as this part of its line is concerned.

It is the opinion of a majority of the court that the facts alleged in the second paragraph of the answer are not sufficient to show an abandonment of the right of way in the city, and that there was no error in sustaining the demurrer thereto.

The judgment is affirmed, with costs.

F. Winter, R. Hill, and G. W. Richardson, for appellants.

S. Stansifer, T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for appellee.

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JUSTICE OF THE PEACE.—*Jurisdiction.*—*Appearance.*—*Waiver.*—Where a defendant appeared before a justice having jurisdiction of the subject-matter of the action, and agreed upon a day for the trial, and subsequently filed an affidavit before the justice for a change of venue, which was granted to a justice of another township;

Held, that he could not plead to the jurisdiction of the justice to whom the cause was sent, over his person, on the ground that he was not a resident of the township in which the justice before whom the cause of action was brought exercised jurisdiction.

APPEAL from the Howard Common Pleas.

WORDEN, C. J.—The appellant brought an action of replevin for three head of cattle, against the appellee, before a justice of the peace of Center township, in said county of Howard. On the return day of the summons, the parties appeared, and by agreement the cause was continued until a subsequent day, at which time the parties again appeared, and the defendant filed an affidavit for a change of venue from the justice, on account of his bias and prejudice. The change was granted to a justice of Clay township. Before the day fixed for trial the defendant demanded a jury, and a *venire* issued accordingly.

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At the time fixed for trial before the justice to whom the cause was sent, the defendant filed a plea or answer in abatement, alleging that he was a resident of Harrison township, in said county, and not of either Center or Clay; and that he did not detain the property in either Center or Clay township; and that there were justices competent to act in Harrison township. The justice sustained a demurrer to this answer, and on trial there was judgment against the defendant, who appealed to the court of common pleas, in which court the demurrer to the answer in question was overruled, the plaintiff excepting; and there was final judgment on the demurrer for the defendant. The plaintiff appeals to this court.

Under the former rulings of this court, an action of replevin may be brought before a justice of the peace either in the township in which the defendant resides, or that in which the property was wrongfully taken and detained. *Jocelyn v. Barrett*, 18 Ind. 128; *Beddinger's Adm'r v. Jocelyn*, 18 Ind. 325; *Test v. Small*, 21 Ind. 127.

Assuming, but not deciding, that the answer in question would have been good if filed in time (it may have been bad for not averring that the property was not originally taken and detained in Center township), we proceed to inquire whether it was not filed too late. The question sought to be presented was one of jurisdiction over the defendant's person, and not over the subject-matter. The objection that the justice had not jurisdiction over the defendant's person was one which he could waive. *Ludwick v. Beckamire*, 15 Ind. 198; *Brady v. Richardson*, 18 Ind. 1; *Storm v. Worland*, 19 Ind. 203; *Gage v. Clark*, 22 Ind. 163. What will amount to a waiver of the objection that the court has no jurisdiction of the person of the defendant? We think an appearance to the action by the defendant, and the taking of any step by him in the defence thereof, is such waiver, because he thereby submits himself to the jurisdiction of the court.

In *Collins v. Nichols*, 7 Ind. 447, it was held that a party

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must avail himself of matter in abatement at the earliest opportunity. In *Cox v. Pruitt*, 25 Ind. 90, a question arose as to the jurisdiction of the Hendricks Circuit Court over the person of the defendant, the cause having come into that court on change of venue claimed to be unauthorized. The court say: "The latter court had jurisdiction of the subject-matter, and the appearance and agreement of the defendant to set the cause for trial in vacation gave that court jurisdiction of the person of the defendant, and he cannot complain." In *Smith v. Jeffries*, 25 Ind. 376, it was held that an appearance by the defendant and submitting to a rule to answer, was a submission to the jurisdiction of the court. In the still later case of *Street v. Chapman*, 29 Ind. 142, a question arose as to the jurisdiction of the Noble Circuit Court over the person of the defendant, the cause having come irregularly into that court, as was claimed, on change of venue. The defendant had appeared and moved to publish depositions. He afterward moved to dismiss the cause and return the papers to the county from which they came. The court say: "This motion came too late. The court had jurisdiction of the subject-matter of the suit, and the appearance of the defendant in that court, and his motion to publish depositions, gave the court jurisdiction of his person. The court assumed jurisdiction of the cause in acting upon that motion."

The principle of these cases is entirely applicable to the one before us.

Here the defendant not only appeared, and by agreement fixed a time for the trial of the cause, but he afterward asked and obtained a change of venue to another justice. This was asking and obtaining an exercise of jurisdiction by the justice before whom the action was commenced.

Without jurisdiction over the defendant's person he could not order a change of venue. His order changing the venue and directing before what justice the cause should be tried, was an exercise of jurisdiction over the cause and the parties; and this was done on the affidavit and motion of the

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defendant. The defendant thus fully submitted himself to the jurisdiction of the justice before whom the action was commenced; and it follows that the justice to whom the cause was sent could exercise jurisdiction.

Having thus submitted to the jurisdiction of the justice, he could not afterward controvert it.

The facts all appeared by the record sent up to the court of common pleas, and the demurrer to the answer should have been sustained.

The judgment below is reversed, with costs, and the cause remanded, with instructions to proceed to dispose of the cause on its merits.

C. N. Pollard, for appellant.

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DESCENT. — *Statute.* — *Sections 23, 18, 22, and 15.* — Where the father of A. died intestate, the owner of certain real estate, leaving him and his mother the only heirs, and the mother afterward married B., by whom she had one child, and died, leaving her husband and said child and A. surviving; *Held*, that A. took the entire real estate of which his father died seized.

APPEAL from the Orange Circuit Court.

DOWNEY, J.—This was an action to quiet the title of the plaintiff therein to certain real estate. The facts involved are that John F. Mathers, the father of the appellant, died intestate in the year 1863, the owner of the land in question, leaving the appellant and his widow, Elizabeth Mathers, as his only heirs. Elizabeth afterward intermarried with the appellee, Alexander C. Scott, by whom she had one child, Dora Scott. Then Elizabeth Scott died, leaving the said appellant and said Alexander C. Scott and Dora Scott surviving her.

Upon this state of facts the court found that said appellant

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was the owner of five-sixths of the real estate, and Alexander C. Scott was the owner of one-sixth of it.

The appellant moved for a new trial, on the grounds that the finding was contrary to law and not sustained by sufficient evidence. This motion was overruled, and the plaintiff excepted and filed his bill of exceptions.

A question is made by counsel for the appellee as to the form of the bill of exceptions, but we are not inclined to allow the objection, as it seems to us that it would more properly have been made in the court below in settling the bill of exceptions, and that it ought not now to be made for the first time.

The decision of the main question depends upon the construction to be given to certain sections of the statute of descents. By section 23, when John F. Mathers died, the title to the real estate descended one-half to the appellant and the other half to his widow, Elizabeth Mathers, in fee simple. The widow, however, took her one-half subject to section 18 of the act, which is as follows: "If a widow shall marry a second or any subsequent time holding real estate in virtue of any previous marriage such widow may not, during such marriage, with or without the assent of her husband, alienate such real estate, and if, during such marriage, such widow shall die, such real estate shall go to her children by the marriage in virtue of which such real estate came to her, if any there be." If this section stood alone, there would be no question about the devolution of the title. But it is provided in section 22 that, "if a wife die, testate or intestate, leaving a widower, one-third of her real estate shall descend to him; subject, however, to its proportion of the debts of the wife contracted before marriage." And section 15 provides, that "every rule of descent or distribution prescribed by this act, shall be subject to the provisions made in behalf of the surviving husband or wife of the decedent."

We apprehend that the construction placed upon these sections of the statute, by which the court was led to give the second husband a part of the estate derived from the first

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husband, was exactly what the legislature intended to guard against. We think section 22 must be held to apply to such real estate of the wife as follows the ordinary rules of descent, and that it cannot apply to the real estate of the wife held in virtue of a previous marriage. It was not intended that the second husband should inherit any of the property of the first, through the wife. The very act of marrying the widow places it out of her power to alienate the land which she has inherited from the former husband; and in the event of her death during such marriage, the quality of the estate which she had in the land, as a descendible estate, in the ordinary sense of the term, is taken away from it, and it "shall go to her children by the marriage in virtue of which such real estate came to her, if any there be." As the appellant is a child, and the only child, of the marriage in virtue of which such real estate came to the widow, the estate which she had at her death went to him. We do not regard section 15 as materially affecting the question. It is intended to secure such provisions as are elsewhere made in the act in favor of the surviving husband or wife. It cannot control the act which imposes upon the wife a disability to convey, and impresses upon her estate a limited and peculiar character by the very act of marriage. The marriage, which is the act relied upon to create the right in the husband, is the very act which makes it impossible for him ever to acquire any interest in the land by inheritance from the wife.

After mature consideration, we are of the opinion that neither Alexander C. Scott, nor Dora Scott, is entitled to any part of the estate; but that it all belongs to the appellant.

The judgment is reversed, with costs, and the cause remanded.

F. Wilson and *A. C. Voris*, for appellant.

T. L. Collins, for appellee.

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TRESPASS.—*Damages.*—Where a complaint for trespass upon real estate avers a consequential injury to personal property, such averment will be taken only as a matter of aggravation of the damages.

JURISDICTION.—*Statute Construed.*—Section 28 of the code (2 G. & H. 56) is a statute defining jurisdiction, and not venue, and an action for injury to real property must be brought in the county where the real estate is situated.

STARE DECISIS.—*Rule of Construction.*—A long line of uniform decisions construing a statute, in the face of the fact that the legislature for a long series of years has acquiesced in such construction, cannot, with judicial propriety, be disregarded or lightly treated.

JURISDICTION.—If a court has no jurisdiction, there is no trial, and the Supreme Court will not look to the record to see whether the merits of the cause were fairly tried.

SAME.—Under section 54 of the code (2 G. & H. 81), an objection to the jurisdiction of the court over the subject-matter of the action is not waived by failing to demur or answer. (FRAZER, J., dissented.)

SAME.—*Arrest of Judgment.*—Such objection may be raised on a motion in arrest of judgment.

APPEAL From the Montgomery Circuit Court.

GREGORY, J.—Suit by the appellee against the appellants for trespass to real property, situate in Warren county, and so averred in the complaint, commenced in the Fountain circuit court, and transferred to the court below by change of venue. Trial by jury, verdict for the plaintiff, motion in arrest of judgment overruled, and judgment.

The question presented by the motion in arrest, the overruling of which is assigned for error, is this: had the court below jurisdiction of the subject of the action?

The complaint is in one paragraph. It is claimed by the counsel of the appellee that it contains two causes of action, one for the trespass to the land, and the other for an injury to personal property. It is clear to our minds that the injury averred to the personal property is only a matter of aggravation of the damages.

Barnum v. Vandusen, 16 Conn. 200, is very much in point. That was an action of trespass for breaking and entering the

plaintiff's close. An injury very similar to the one in the case in judgment was averred in the complaint.

The learned judge, speaking for the court, says: "But here, the defendant's sheep, while trespassing upon the plaintiff's land, communicate to the plaintiff's sheep a disease of which numbers of them die, and no sufficient justification being shown for the trespass, the question is, whether this communication of disease is such an injury as aggravates the damage occasioned by the trespass, and authorizes the plaintiff to recover damages for the loss of his sheep, as well as for the breach of his close. We think, it is such an injury. Indeed, the rule is believed to be universal, that any consequential damage, resulting from the trespass, and not too remote, may be declared on as matter of aggravation, and if proved, damages may be recovered for it."

It was also held in that case, that it could be shown in evidence to aggravate the damages that the defendant knew that his sheep were diseased.

The code provides, that "actions for the following causes must be commenced in the county in which the subject of the action, or some part thereof, is situated: first, for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property." Sec. 28, 2 G & H. 56.

Sections 50 and 54 of the code are as follows:

"Section 50. The defendant may demur to the complaint when it appears upon the face thereof, either, first, that the court has no jurisdiction of the person of the defendant, or the subject of the action; or, second, that the plaintiff has not legal capacity to sue; or, third, that there is another action pending between the same parties for the same cause; or, fourth, that there is a defect of parties, plaintiff or defendant; or, fifth, that the complaint does not state facts sufficient to constitute a cause of action; or, sixth, that several causes of action have been improperly united; and for no other cause shall a demurrer be sustained; and, unless

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the demurrer shall distinctly specify and number the grounds of objection to the complaint, it shall be overruled."

"Section 54. When any of the matters enumerated in section fifty do not appear on the face of the complaint, the objection (except for misjoinder of causes) may be taken by answer. If no such objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court over the subject of the action, *and except the objection that the complaint does not state facts sufficient to constitute a cause of action.*" The words in italics were added by amendment in 1855. See Acts of 1855, p. 60.

Does section 28, *supra*, relate only to the venue, or is it jurisdictional?

If it relates only to the venue, it is clear that a demurrer would not lie where the objection appears upon the face of the complaint, and if in such case a demurrer is proper, then it is equally clear that the objection is not waived by a failure to demur or answer. The same words, "the subject of the action," are used in both sections 50 and 54.

It cannot, with any fairness, be said that these words mean one thing in section 50, and another thing in section 54.

It is admitted that there is a difference between a wrong venue and the want of jurisdiction of the subject of the action. The Warren Circuit Court is a different tribunal from the Fountain Circuit Court. It is true that they are both circuit courts, but each exercises an independent jurisdiction. It is certainly in the power of the legislature to confer jurisdiction that shall be exclusive in each. If language can do this, it seems plain that section 28 of the code has done it.

This question has been repeatedly adjudged in this court.

In *Brownfield v. Weicht*, 9 Ind. 394, DAVISON, J., speaking for the court, says: "The appellants seek to reverse the judgment upon four grounds; first, it does not appear by the complaint that the land in controversy is situate in Steuben county.

"The code says actions for the recovery of real estate, or any interest therein, must be commenced in the county in which the subject of the action, or some part thereof, is situated. 2 R. S. p. 33. Still the pleading in question is unobjectionable, and would have been so held on demurrer, because the circuit court being of general and unlimited jurisdiction, its authority to proceed in the trial of a cause need not affirmatively appear in the complaint. Van Santvoord Pl. 663. The objection for want of jurisdiction, if it exists, may be raised by the answer, or at any subsequent stage of the proceedings. But, in this instance, it did not exist. The record before us sufficiently shows the subject of the action to be located in Steuben county." In *Prichard v. Campbell*, 5 Ind. 494, the same learned judge, in speaking for the court, says: "Another objection is raised to these proceedings. No evidence was adduced on the trial tending to prove that the close described in the complaint was within the county of Madison. In that respect the proof was defective. Trespass for breaking and entering a close is a local action. It can only be brought in the county in which the premises are situated. Their locality ought, therefore, to be proved as they are described. 2 Phil. Ev. 136; *Ham v. Rogers*, 6 Blackf. 559.

"In *Roach v. Damron*, 2 Humph. 425, it was decided that 'the land upon which the trespass is committed must be proved to lay in the county in which the action is brought. This defect in proof will not be cured by verdict.'"

In the case in 2 Humph., referred to by the court, it is expressly said, in speaking of the action (it being an action of trespass, for breaking and entering the plaintiff's close), that, "in its nature, it is a local action, the court of the county in which the land is situated alone having jurisdiction."

In *Parker v. McAllister*, 14 Ind. 12, it was held that the objection could be taken by demurrer on the ground that the court had no jurisdiction of the subject of the action.

In *The New Albany and Salem Railroad Co. v. Huff*, 19 Ind. 444, DAVISON, J. speaking for the court, says: "In

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support of the motion in arrest, it is argued that the real estate taken in execution, the title to which is directly involved in this suit, being in Jasper county, the Tippecanoe Circuit Court had no jurisdiction. The code says: 'Actions for the following causes must be commenced in the county in which the subject of the action, or some part thereof, is situated: 1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of any such right or interest. 2. For the partition of real estate. 3. For the foreclosure of a mortgage of real property.' 2 R. S. p. 33. Does this enactment apply to the case at bar? It is true, as contended, the trust-deed covers lands in Tippecanoe county, belonging to the company; but the title to these lands was not at all in issue, because, as a reason for the levy in Jasper county, it is alleged in the complaint, that the lands in Tippecanoe were so largely incumbered that an execution, issued on plaintiff's judgment, and levied upon them, would have been unavailing. Indeed, the object of the suit was to annul the trust-deed, as to the property levied on, and to render the levy of the plaintiff's execution, on that property, effective. As has been seen, the levy was made in Jasper county, and the question arises, had the court, before which this cause was determined, power to decide upon the title, and direct the sale of lands in that county? This inquiry seems to be fully answered by the statutory enactment to which we have referred: 'Actions for the determination, in any form, of any right or interest in real property, must be commenced in the county in which the subject of the action, or some part thereof, is situated.' The title to the lands levied on by the plaintiff's execution, no part of which are situate in Tippecanoe county, was, plainly, the subject of the present action; hence, the circuit court of that county had no power to adjudicate upon the case made by the record."

In *Vail v. Jones*, 31 Ind. 467, there had been a verdict upon an issue formed, and it had been agreed that the jury should find on that issue. The judgment had been arrested

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in the court below. The decision of the majority was put on the ground alone that the matter had been set up in a counter claim. The rulings in *Parker v. McAllister*, and *The New Albany and Salem R. R. Co. v. Huff*, *supra*, were recognized as good authority.

The code was passed in 1852. There has been a long line of unbroken decisions holding that this twenty-eighth section was one of jurisdiction, and not of venue. In opposition stands the reasoning in *The Indianapolis and Madison Railroad Co. v. Solomon*, 23 Ind. 534. The decision in that case is clearly right, but is put on the wrong ground. Under the facts, the case is within the ruling in *Brownfield v. Weicht*, *supra*. The court being one of general jurisdiction, it was not necessary to aver in the complaint that the animals were killed in the county where the suit was commenced, and it turned out in the evidence that they were, in fact, killed within the jurisdiction of the court. Moreover, under the act of March 4th, 1863 (Acts of 1863, p. 187), it can well be held, that the place where the animals are killed is matter of venue alone, for the reason that the provision was made for the benefit of the owners of animals thus killed, and could, of course, be waived by the persons for whose sole benefit the enactment was made. This is also true in reference to the divorce law, under which *Lewis v. Lewis*, 9 Ind. 105, was decided.

These two classes of cases are transitory in their nature. But as a rule of construction, it is thought that the position, that the fifty-fourth section of the code was only intended to except such want of jurisdiction over the subject-matter of the action as would make the proceedings *coram non judice* and void, is not tenable, for the plain reason that by its very terms it does embrace such want of jurisdiction as may be raised by an answer. When there is a total want of jurisdiction over the subject-matter of the action, it will appear on the face of the complaint. For instance, by no possible averments could it be made to appear in a complaint for the recovery of real property, that the common pleas court had jurisdiction of the subject of the action.

But whatever opinion may be entertained of the twenty-eighth section of the code, independent of the adjudged cases, it cannot now as a rule of construction be considered an open question. A long line of uniform decisions construing a statute, in the face of the fact that the legislature for a long series of years has acquiesced in such construction, cannot, with any judicial propriety, be disregarded or lightly treated.

But it is suggested that this is a technical error, and that it is cured by sections 101 and 580 of the code. The former provides, that "the court must in every stage of the action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, and no judgment can be reversed or affected by reason of such error or defect." If, then, this error is cured by this section, the provisions of the twenty-eighth section of the code are wholly without effect for any purpose; for it would be the duty of the court to disregard such an error at every stage of the action, as much at its commencement as at its termination. It will be noticed that all the cases enumerated in section twenty-eight of the code are such as may involve an investigation into the title of real property. Under our registry laws, deeds and mortgages are required to be recorded in the county in which the lands embraced therein are situate. It would tend greatly to the security of the substantial rights of defendants, to have the action in that class of cases commenced in the county "in which the subject of the action is situate," where the title could with facility be examined, and where the jury could with convenience examine the premises. It is true, there is no other class of cases in which this right is equally important, and the distinction made at the common law between actions for the breach of covenant in a deed of conveyance of land, and actions for trespass *quare clausum fregit*, is that which is regarded by Chief Justice MARSHALL in *Livingston v. Jefferson*, 1 Brock. 203, as technical. But the substantial rights of defendants in both these classes of cases are recognized by that distinguished

jurist in that case. It may be bad legislation to secure these rights in the one, and deny them in the other class of cases, but this does not change the law. The distinction referred to, contained in a *dictum* of Lord MANSFIELD, between actions *in rem* and those sounding in damages, was expressly overruled in England, as shown by Chief Justice MARSHALL in *Livingston v. Jefferson*, *supra*. The case referred to, of *Doulson v. Matthews*, 4 Term R. 503, was decided in 1792, and was an action of trespass for entering the plaintiff's dwelling-house in Canada and expelling him. The case in Cowper, containing the *dictum* of Lord MANSFIELD, was cited, but KENYON, C. J., said that the contrary had been held. BULLER, J., said: "It is now too late for us to inquire whether it were wise or politic to make a distinction between transitory and local actions; it is sufficient for the courts that the law has settled the distinction, and that an action *quare clausum fregit* is local. We may try actions here which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local." The distinction at the common law is between local and transitory actions. That case is cited with approbation in *Ham v. Rogers*, 6 Blackf. 559, in which it was held, that the action of trespass *quare clausum fregit* is local, and can be brought only in the county in which the trespass was committed, and that, too, in a case in which the ruling was a denial of justice. That case is in harmony with *Sherry v. Winton*, 1 Ind. 96, in which BLACKFORD, J., in speaking for the court, says: "A circuit court is a county court only, whose jurisdiction is limited, generally, by the bounds of the county. It can issue no process, whether mesne or final, to any other county, unless by some special statutory provision."

It was suggested in argument that the affidavit for a change of venue shows that the defendants were not deprived of any substantial rights in not bringing the action in Warren county. It does not follow because there were local prejudices against the defendants in Warren county, that they lost

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no rights by the suit being commenced in Fountain county. It seems that at least they gained nothing, as the same prejudices existed in the latter as in the former county. But it does not follow that a change of venue from the Warren Circuit Court would have resulted in the selection of the forum in which the case was in fact tried; it might have resulted in sending it to some county in which the jury would not (as it is claimed they did in this case) wholly disregard the evidence.

The only part of the five hundred and eightieth section of the code that can have any bearing on this question is this: "Nor shall any judgment be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below." If the court below had no jurisdiction, then there was no trial, and we cannot look to the record to see whether the merits of the cause were fairly tried.

The statute of 16 and 17 Charles II., c. 8, is not in force in this State. The statute of 1843 referred to in *Dumont v. Lockwood*, 7 Blackf. 576, is this: "For want of a right venue, if the cause was tried by a jury of the right county." It certainly could with no plausibility be contended that this would cure the error of a trial in the wrong county. The venue may be stated wrong, as was done in that case, but this would not prevent the trial in the right county. That was a transitory action commenced in the right county with the statement of a wrong venue. The cases referred to in *Dumont v. Lockwood* are *Craft v. Boite*, 1 Saund. 241, and *The Mayor of London v. Cole*, 7 Term R. 579. The former was for slander, and the latter for breach of covenant in a deed for the conveyance of land, held by LORD KENYON to be transitory, and not local.

If our construction of section fifty-four of the code is right, it follows that this objection was not waived by failing to demur or answer. If, however, we are wrong, then the objection cannot be raised either by demurrer or answer; for if it is not a want of jurisdiction of the subject

of the action, within the meaning of the code, then it is nothing.

It is claimed that in *Newton v. Bronson*, 13 N. Y. 587, it was held, that the 123d section of the code of procedure of that state, which is very nearly like the 28th section of our code, only relates to "the place of trial in civil action," and is not jurisdictional. But this is a mistaken view of that case. That was a suit for the specific performance of a contract for the purchase of land lying in the state of Illinois, but the parties were residents of New York. The point ruled was, that in such a case the 123d section of their code did not take from the Court of Chancery its jurisdiction.

DENIO, C. J., in speaking of the 123d section of their code, said: "The latter branch of the statute is vague and indefinite, but the language is comprehensive, and it may perhaps embrace suits for a specific performance of contracts for the sale of lands, where they are situated in this State. It has been so held in the superior court of the city of New York, and I am inclined to assent to the views of that court. *Ring v. McCoun*, 3 Sandf. 524." The case referred to was heard before OAKLEY, C. J., and SANDFORD and PAINE, JJ., in 1851, three years after the adoption of the New York code. It was an action to enforce an implied trust in lands. The question arose on a demurrer to the complaint, on the ground that the court had no jurisdiction of the subject of the action. The suit was brought in the city of New York; the lands were situated in the county of Queens.

It was held, that the court in which the action was brought had no jurisdiction. SANDFORD, J., in speaking for the court, said: "To express our idea in a different form, when the subject of the action, not of a transitory nature, is situated in the county of Queens, that fact must govern as to our jurisdiction; although it may be true that the acts which furnish the grounds of the suit were all done in the city of New York, and in that sense the cause of action arose there."

It is suggested that *The N. A. & S. R. R. Co. v. Huff* is

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in its nature *in rem*, operating on the title to real property, and therefore not in point in the case in judgment. It is expressly held to be embraced in the provisions of the 28th section of the code. If the provision in relation to that class of cases is jurisdictional, then that in relation to actions "for injuries to real property" is also jurisdictional. But that was not an action *in rem*. It was a suit in the nature of a suit in equity by a judgment creditor to set aside a fraudulent deed of conveyance made by the execution defendant, so that the land could be made subject to execution on the plaintiff's judgment. In such a case, the decree is not *in rem*, but *in personam*. See *Gardner v. Ogden*, 22 N. Y. 327.

The court below erred in overruling the motion in arrest of judgment.

There are other questions argued by counsel; but as the court below had no jurisdiction of the subject of the action, they do not arise and have not been considered.

Judgment reversed with costs; cause remanded, with directions to sustain the motion in arrest of the judgment.

FRAZER, J. (dissenting). The question is not whether the suit should have been brought in Warren county, but whether, after they have appeared and pleaded to the merits in Fountain, obtained a change of the venue to Montgomery, found issues, gone to trial, and been defeated before a jury, the defendants can, for the first time, by motion in arrest, object that the suit should not have been brought in Fountain nor tried in Montgomery? If the law authorizes a party thus to trifle with the courts of general jurisdiction, to submit his cause to their adjudication, occupy their time and attention in hearing it, and then, when beaten upon the merits, to set up that all that has been done is a farce, it is certainly time that the law should be changed.

In *The Indianapolis and Madison R. R. Co. v. Solomon*, 23 Ind. 534, we expressly held that such was not the law, and this upon such deliberation as courts of last resort are apt

to bestow upon a question before they venture to overrule previous decisions of the same tribunal; as we did with unanimity in that case. It will not do now to base a judgment, in direct opposition to that case, upon the ground that the question is closed by a long line of uniform decisions and legislative acquiescence therein. Legislative acquiescence for a period of six years has followed that case and given it whatever of sanction may be derived from the fact. *Vail v. Jones*, 31 Ind. 467, was put upon a ground by the majority of the court which rendered it unnecessary to consider the question now involved, and, on that account, it was not discussed or decided by the majority in that case, and therefore it cannot, as I think, be regarded as an authority upon the question.

If the Solomon case is bad law, it should be overruled, I grant. The question is one of practice, and with such questions greater liberties may be taken than with rules of property, upon the faith of which men make contracts or acquire titles. A rule of practice established in error, if found to embarrass the administration of justice, may, with little inconvenience, be corrected. It is very certain that the rule of the Solomon case would work well and never could be used as a trap to defeat just judgments, or in any way hinder the correct administration of the law. If the principle of that case is to be disapproved now, it must be, I think, not because it is mischievous but because it is in conflict with the statute.

By our law, suits for divorce are required to be brought in the circuit court of the county in which the petitioner is a *bona fide* resident. This requirement is quite as imperative as the 28th section of the code is that any other suit must be brought in the county in which the subject of the action is situated. And an action *in personam*, to recover damages, is, in its nature, quite as transitory as a suit for divorce, and can be quite as well tried in another county than that in which the statute requires it to be instituted. And yet in *Lewis v. Lewis*, 9 Ind. 105, a divorce case, it was held that, after answer, when the complaint was silent, it was too late to object that the suit was brought in the wrong county,

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the fact appearing by the proof. A suit for divorce concerns the *status* of the plaintiff, and the decree operates upon that *status*. This decree was affirmed though the suit was brought and tried in a wrong county. If the 28th section of the code means that jurisdiction of the subject of the action is exclusive in the courts of the county where the suit is directed to be brought, then a divorce case is within the same rule. There can be no good reason for placing such a construction upon one statute and not upon the other. The same remark may, with emphasis, be made of the statute giving an action for killing cattle upon railroads not fenced, to be brought in the county where the damage was done. This latter statute is penal, and therefore subject to strict construction.

Before the code, nothing was better settled than that, in civil cases, advantage could not, after verdict, be taken of the fact that a personal action was brought and tried in a wrong county. *Mayor of London v. Cole*, 7 T. R. 579. The English statute of jeofails, 16 and 17 Car. 2, chap. 8, was express that the judgment should not for that cause be arrested or reversed, and we had re-enacted substantially the same statute. R. S. 1843, p. 714. *Dumont v. Lockwood*, 7 Blackf. 576. See, also, 1 Smith Lead. Cas. 793, the learned note to *Mostyn v. Fabrigas*. It has been supposed that secs. 101 and 580 of the code go far beyond the former statute of jeofails in covering, after a fair trial, errors and defects in legal proceedings, not affecting substantial rights. 1 Van Santvoord Pl. 834. Certainly, the general tenor of our decisions is to that effect. There was formerly, in England, as well as here, in the very nature of things, a substantial and a formal distinction as to the locality of trials, which may yet exist. Where the proceeding is *in rem*, it may sometimes be that the judgment will have no effect if rendered in a wrong county. This was so in England, in ejectment, because the sheriff of the county where the cause was tried was to deliver possession, and this he could not lawfully do outside of his bailiwick. See *Dequindre v. Williams*, 31 Ind. 444. So when the question was, in any case, one of title merely, there

was a solid distinction of locality. *The New Albany, etc., R. R. Co. v. Huff*, was a case of this kind. But in cases like this, for damages merely, the matter was deemed, as long ago as Lord MANSFIELD's time, one of mere form. This distinction, undeniable in its very nature, was plainly stated by that great judge in the leading case of *Mostyn v. Fabrigas*, Cowp. 176, and has never been questioned. See also Chit. Pl. 266. It is a mistake to suppose that this distinction was ever questioned in *Doulson v. Matthews*, 4 T. R. 503, or by Chief Justice MARSHALL, as will be seen upon examination.

In suits like this, the rule of the common law, that the venue must be laid in the right county, was quite as imperative as our statute is, that the suit must be commenced in the right county, and I suppose for the same reason, that is to say, that the jury to try the cause may come from that county. There can be no other reason. And since it has come to be believed that a jury having no previous knowledge of the matter in controversy, and which must, therefore, rely wholly upon the evidence, is quite as safe as any other jury, and indeed in all respects to be preferred, the fact that the place of trial is merely a formal and technical requirement, in its essential nature, must be very apparent indeed. It was so regarded by MARSHALL, J., in *Livingston v. Jefferson*, 1 Brock. 203. It is not to be supposed, without finding a very clear expression of such a purpose, that the legislature intended that a party who had voluntarily, and without objection, submitted his cause to such a jury, might, after a verdict against him, avail himself, for the first time, of this formal requirement. If sections 101 and 580 of the code do not preclude the possibility of such a result in this case where these appellants, in applying for a change of venue from Fountain for the purpose of preventing the cause from being sent to Warren, state under oath that they could not have a fair trial in Warren, because of local prejudice against them, existing there, then I do not comprehend the purpose or meaning of these enactments.

In my judgment the twenty-eighth section of the code

was not intended at all either to define or limit the general jurisdiction of our courts. The code itself was meant, not to declare what should be the jurisdiction of courts over subjects, but how proceedings should be conducted in them. Its title, as well as its body, shows this. Other acts declare the nature of their jurisdiction and define it. The twenty-eighth and five other sections of the code compose article 3, and this article is entitled, "actions—where commenced." The ordinary import of this language relates to place or venue, and not to jurisdiction; and so of the language of this particular section, and, indeed, of the whole article. It simply requires that the several classes of actions named shall be brought in the counties to which it refers, without a word to indicate that jurisdiction of the subjects respectively is exclusive in the courts of such counties. Nor can this be inferred from the language employed. It makes all actions local, so that no argument whatever can be based upon the former distinction between those local and those transitory. This section of the code is taken, with but a slight alteration, from the New York code, section 123, the change being that the action shall be "commenced," instead of "tried," in the county indicated. The court of appeals of that state, in considering the purport of it, use this language: "The object of the section is to determine the venue in the classes of actions to which it refers, and it does not profess to limit or define the jurisdiction of the court." *Newton v. Bronson*, 13 N. Y. 587.

The power to hear and determine a cause is jurisdiction in a legal sense, and it is to my mind very clear that this power, as to a given cause, may be conferred by law upon any circuit court in the State; and yet, at the same time, without inconsistency, it may be required that suits shall be brought only in the county where the subject of the action is situate, or where the cause of action arose, or where the defendant resides; and that the effect of this requirement is, not to deny jurisdiction of the subject to the court of any county, but merely to fix the proper venue.

If this is not so, then jurisdiction and venue are not distinguishable; or rather, to determine the proper venue of the cause by law, means that no court elsewhere has power to hear and determine that cause. Elementary principles would inevitably lead a step further. The court which has no jurisdiction of the subject of the action cannot, it is universally held, render a valid judgment, even by the consent of all the parties, for consent cannot confer jurisdiction of a matter, where the law has denied it.

Jurisdiction of the parties and of the subject must co-exist, in order to enable any court to render a judgment which is not utterly void. The parties may voluntarily submit themselves to a jurisdiction—appearance and a failure to question the right of the court to bind them waives the objection as to the parties—but as to the subject, it is never too late, even after judgment, to urge it. I understand the fifty-fourth section of the code merely to be in harmony with this doctrine. In that sense, it is wise in its provision that the objection that the court has no jurisdiction of the subject shall not be waived by a failure to make it by demurrer or answer. Before that section was amended, in 1855, the objection, that no case was made by the complaint, was waived, unless it was raised by demurrer, for, of course, it could not be by answer, but would always appear, like the want of jurisdiction of the subject, upon the face of the complaint, and it would be senseless to attempt to show it by answer. It is beyond my power of belief that it was ever intended that a failure to object should cure a complaint which failed to show any cause of action, and yet not waive the objection that a meritorious suit was brought in a wrong county. I can readily see, however, that facts not averred, which would make a good case, might be proved upon a trial, and that legislation pre-eminently intended to make traps and pitfalls of no avail in the conduct of a cause, could assume, after verdict, that a good case must have been proved, else the plaintiff would not have succeeded.

It will be seen, upon close examination, that the present question has not, in a single one of the cases relied on by my brethren, been decided. The *N. A. & S. R. R. Co. v. Huff*, is the only one of them in which the objection was held good after a verdict otherwise recognized as valid, and I have already distinguished that case from the present, as one in its nature *in rem*, operating upon the title to real estate. *Ring v. McCoun*, 3 Sandf. 524, was held to be of the same character. *Gardner v. Ogden*, 22 N. Y. 327, was a case where the decree sought would operate directly on the person of the defendant, compelling him to act, and therefore unlike the Huff case, where by its own force the decree would operate upon the title.

It is by inference only, as it seems to me, that the cases referred to, with perhaps a single exception, can be made to support the motion in arrest. This inference is deduced from language employed by the judges, where, I think, words were not well chosen, or not used with exactly legal accuracy, as they would have been if the very question had been in hand. There is a well recognized distinction between jurisdiction over the subject of the action and jurisdiction over the particular cause. The latter may not exist, though the former does, in a given instance. In short, as has been already intimated, the law may require the particular cause to be commenced in a certain county or court, not because the courts elsewhere have no jurisdiction of the subject, but because the legislature is of opinion that it will be more convenient or less expensive to try it in the county or court chosen. *Prigg v. Adams*, 2 Salk. 674, is a case where the decision rested upon this distinction. There the judgment (for five shillings) of a court having general jurisdiction of the subject was held valid, the cause arising in Bristol, though the statute required all such causes arising in Bristol under forty shillings to be brought in an inferior court, declaring that the judgment of any other court should be void. The judgment was erroneous, of course, but it would have been void if the effect of the statute had

been to deprive the superior court of its general jurisdiction of the subject. This distinction has never been questioned to my knowledge. 1 Smith Lead. Cas. 821. The words, "jurisdiction of the subject," are frequently found in the books, and are used in this general sense, meaning the general power of the court. I cannot bring myself to believe that the legislature, in adopting the same phrase, intended to express a different idea. Thus interpreted, the fifty-fourth section of the code is in harmony with the liberal and enlightened purpose of that act; otherwise, it is a return to the intense technicality of two centuries ago, abandoned in England, and condemned as mischievous everywhere else.

I admit that it would logically follow, from the views already expressed, that the objection could not be raised by demurrer, and that this is not in harmony with *Parker v. McAllister*, 14 Ind. 12. It results, however, in no inconvenience or embarrassment that a motion or answer shall be required, the former when the matter appears on the face of the complaint, the latter when it does not. At common law, a demurrer would reach it, for then any objection apparent by the declaration could thus be raised, whereas now the statute authorizes only certain specified questions to be made in that way.

The subject of the action may determine its proper venue without resulting in a denial of the general power of any court elsewhere to try the cause, if objections be not made, as I think has been already shown; and if this be true, it seems clearly to follow that no argument against the construction which I put upon the fifty-fourth section of the code can be founded upon a comparison of the language of that section with that which is employed in the twenty-eighth section.*

Marshall M. Milford, J. Poole, J. McCabe, J. M. Butler, Monroe M. Milford, R. C. Gregory, J. H. Brown, J. E. McDonald, and E. M. McDonald, for appellants.

T. F. Davidson, and *J. Buchanan*, for appellee.

*Opinions filed January 2d, 1871; petition for a rehearing overruled February 2d, 1872.

Hoskins v. Hutchings et al.

HOSKINS v. HUTCHINGS ET AL.

MORTGAGE.—Widow.—Dower.—Where a husband mortgaged land (his wife not joining) on the 12th day of January, 1853, and in 1856 the mortgage was foreclosed, and the husband died in 1859, the wife had no interest in the land, dower having been abolished after the execution of the mortgage, with no saving clause for this class of cases.

APPEAL from the Clark Circuit Court.

DOWNEY, J.—Suit by the appellant against the appellees for partition of real estate. Judgment for the appellant for one-third, for her life, of the real estate, and for the appellees for the residue of the land, and partition made and approved accordingly. Each party moved for a new trial, which was denied, each excepted, and each has appealed and assigned errors.

The facts are, that the appellant was the wife of Henry Hoskins, who was the owner in fee simple of the land in question. On the 12th day of January, 1853, he mortgaged the land to Hutchings, his wife not joining in the mortgage. In 1856, the mortgage was foreclosed, and at a sale of the land it was purchased by Hutchings, the mortgagee. Henry Hoskins died in 1859.

The appellant insists that she is entitled to one-third in fee simple of the land; the appellees contend that she is not entitled to any of it, and the court awarded to her, as we have seen, one-third of it for her lifetime.

In principle, we think this question is decided in *Strong v. Clem*, 12 Ind. 37, and the cases following it. It is true that in those cases the fee simple had been conveyed by the husband, when in this there was only a mortgage executed by him on the land. But when this mortgage was executed, it gave the creditor a valid lien on the land, subject only to the contingent right of the wife to dower in the same, in the event that she should survive her husband. We cannot see how the legislature could increase the interest of the wife, and in the same proportion diminish that

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of the mortgagee, without incurring the charge of having impaired the obligation of the contract.

The creditor has here a specific lien upon the mortgaged premises, which cannot be taken away from him, without an evident infraction of the constitution of the United States, and a violation of a plain principle of justice and right. Const. U. S., art. I, sec. 10.

Coming to the other branch of the question, we must follow the cases which have been decided by this court, which hold that the inchoate dower estate of the wife being abolished, she has, in such a case, no interest in the land. It is unfortunate that the legislature did not, in the section abolishing tenancies in dower and by courtesy, except from the operation of the act inchoate rights. While, in this case, the mortgagee must be allowed to hold the interest which was mortgaged to him, undiminished by any subsequent legislation, there would seem to be no justice in such legislation as gives him the land discharged from the dower estate altogether. But we feel compelled to follow the cases to which we have referred in this respect, as well as in the other, and hold that the widow has no interest whatever in the real estate in question.

Judgment reversed and the cause remanded, with instructions to dismiss the complaint, costs to appellant, against Josephine R. Hoskins.*

J. H. Stotsenburg and *T. M. Brown*, for appellant.

T. W. Gibson, for appellees.

*Petition for a rehearing overruled.

37	325
140	545
143	366

THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS RAILROAD COMPANY v. COX.

PLEADING.—Demurrer.—Where a complaint contains one good paragraph, a demurrer to the whole complaint should be overruled.

PRACTICE.—Instructions.—Exceptions.—Where an instruction asked by a party, is in writing, signed by the party or his attorney, it thereby becomes part of the record. An exception may be taken to the giving of such instruction or

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the refusing to give it by the words "given (or refused) and excepted to" being written after it and signed by the party excepting or his attorney. If such instruction be so made part of the record, and the exception be so entered, the instruction need not be authenticated by the signature of the judge or put into a bill of exceptions. *Cross v. Pearson*, 17 Ind. 612, overruled on this question.

SAME.—*Record*.—Where instructions are refused, it will be presumed, the evidence not being in the record, that they were refused because not applicable to the evidence.

APPEAL from the Johnson Common Pleas.

BUSKIRK, J.—This action was brought by the appellee against the appellant, to recover the value of certain cattle killed and injured by the locomotive and cars of the appellant. The complaint was in two paragraphs. The first was based upon the statute of 1863. The second alleged that the cattle were killed and injured by the carelessness of the servants of the appellant. The appellant demurred generally to the complaint. The demurrer was overruled and an exception taken. The appellant answered by a denial. The cause was tried by a jury and resulted in a finding for the plaintiff.

The court overruled a motion for a new trial, and rendered judgment on the verdict.

Three errors are assigned: 1. The overruling of the demurrer to the complaint. 2. The refusal of the court to instruct the jury as requested by the appellant in the seventh instruction. 3. Overruling a motion for a new trial.

The counsel for appellant, in their brief, admit that there was one good paragraph in the complaint, and, the demurrer being to the whole complaint, that the court committed no error in overruling it. This disposes of the first error.

The evidence is not in the record, and, consequently, we are in no condition to determine whether the court erred in refusing a new trial. There is nothing for us to base any judgment upon, and in such a case we will presume that the ruling of the court below was correct.

This leaves for our consideration the refusal of the court to give the seventh instruction as asked by the appellant.

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There is, however, a preliminary question to be determined before we can consider the principal question.

The appellee insists that the exception to the refusal of the court to give the instruction and the instruction itself are not before the court in a form to authorize our examination of the question. The instruction refused was in writing and signed by counsel. The following entry was at the close of the instruction. "Refused and excepted to at the time. Overstreet & Hunter, Banta & Byfield, attorneys for defendant."

It is contended by the appellee that an instruction refused can only be made a part of the record by a bill of exceptions, or authenticated by the signature of the judge who presided at the trial, and in support of this position reference is made to the case of *Cross v. Pearson*, 17 Ind. 612. In that case the court say: "A part of the instructions asked by the plaintiff have appended to them the words, 'refused and excepted to,' signed by counsel; and a part asked by defendant the words, 'given and excepted to,' and likewise signed by plaintiff's counsel. They do not appear to be authenticated by the signature of the judge, nor are they embodied in the bill of exceptions." The court held that the instruction was not in the record, and that the exception to the refusal of the court to instruct was not properly taken. It is maintained by the counsel for the appellant that the above decision is repugnant to the statute, and is in conflict with earlier and later decisions of the court.

The sixth clause of section 324 of the code, 2 G. & H. 200, is as follows:

"Where either party asks special instructions to be given to the jury, the court shall either give each instruction as requested, or positively refuse to do so; or give the instructions with a modification, in such manner that it shall distinctly appear what instructions were given, in whole or in part, and in like manner those refused, so that either party may except to the instructions, as asked for, or as modified,

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or to the modification. All instructions given by the court must be signed by the judge, and filed, together with those asked for by the parties, as a part of the record. The instructions shall not be entered at large on the final record, unless either party may wish to remove the cause to a superior court.

"Sec. 325. A party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions; but it shall be sufficient to write at the close of each instruction, 'refused and excepted to,' or 'given and excepted to,' which shall be signed by the party or his attorney."

We are clearly of the opinion that the above sections of the statute will not bear the construction placed on them, in the case of *Cross v. Pearson, supra*. The learned judge, who delivered the opinion of the court seems to have been misled by the provision, that "all instructions given by the court must be signed by the judge, and filed, together with those asked for by the parties, as a part of the record." The statute contemplates two kinds of instructions; first, those given by the court of its own motion, and these must be signed by the judge and filed; second, those asked for by the parties, and these must be filed together with those given by the court, and in this manner the instructions given by the court of its own motion and those asked for by the parties become a part of the record. When a party asks the court to give an instruction, it should be in writing and signed by the party or his attorney. When the instructions given by the court of its own motion are signed by the judge, and those asked for by the party are signed by the party or his attorney, they are sufficiently authenticated and can be readily identified. When they are signed by the judge or the party asking them and are filed, they become a part of the record, but the instructions are not to be entered at large upon the final record, unless either party may appeal the case to this court, when they are to be copied into the record, as the complaint, answer, reply, and demurrer filed in a cause are.

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Section 325 provides two modes in which an exception can be taken to the giving or the refusing to give instructions. The first is by a formal bill of exceptions, but this mode is not required; the second is by writing at the close of the instruction the words, "given and excepted to," or "refused and excepted to," and this entry must be signed by the party or his attorney. The statute declares that this shall be sufficient to take an exception to the giving or the refusing to give an instruction. Such has been the uniform construction of the statute by this court, except in the case of *Cross v. Pearson, supra*.

We will refer to some of the earlier and later decisions.

In the case of *Ledley v. The State*, 4 Ind. 580, this court was, for the first time, called upon to place a construction upon the above sections of the statute. In that case the court held that the memorandum at the close of an exception, "refused and excepted to," must be signed by the party or his attorney.

This court, in the case of *The State v. Rabourn*, 14 Ind. 300, held that the exception to the instruction given was not properly taken, for the reason that the exception related to the time of the filing of the bill of exceptions, and not to the time when the decision was made.

In *Bush v. Durham*, 15 Ind. 252, and *Maghee v. Baker*, 15 Ind. 254, this court held that "an exception to an instruction given by the court, in these words: 'The court refused to give such instruction, and the plaintiff excepted,' is not well taken, unless signed by the party or his attorney."

The precise point involved in the case under consideration was involved in the case of *Newby v. Warren*, 24 Ind. 161, where the court held that exceptions to instructions given or refused by the court may be taken in two ways. The first method provided by statute, 2 G. & H. 201, is by the party or his attorney writing at the end of each instruction, "given (or refused) and excepted to," and signing it. The other method is by a general bill of exceptions. When neither of these methods is resorted to, the instructions form no part

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of the record, and will not be noticed. If the words, "given (or refused) and excepted to," written after the instruction, are signed by the judge instead of by the attorney, it is not a proper reservation of the exceptions.

The above case is in direct and irreconcilable conflict with the case of *Cross v. Pearson, supra*. In the one it was held that the instruction must be authenticated by the signature of the judge, while in the other it was held that if it was signed by the judge instead of the party or the attorney, it was not a proper reservation of the exception.

The ruling in the case of *Newby v. Warren*, 24 Ind. 161, was followed in the case of *Medler v. The State*, 26 Ind. 171.

We are of the opinion that the exception to the instruction refused was properly taken, and that the said instruction constitutes a part of the record, and that the decision in the case of *Cross v. Pearson, supra*, is repugnant to the statute, and in conflict with the other decisions of this court, and that said case is, on the point under consideration, overruled.

It is next maintained by the appellee that we cannot reverse the judgment, even if the instruction refused was correct as an abstract proposition, and is properly in the record, for the reason that where instructions are refused, the evidence not being in the record, it will be presumed that they were refused because they were not applicable to the evidence.

The above proposition is sustained by a long and unbroken line of decisions in this court. A large number of the cases are collected in note *e.*, 2 G. & H. 200. The last case we have found sustaining the same principle is *Walters v. Hutchins' Adm'x*, 29 Ind. 136.

The instruction asked and refused was in these words: "If a public highway crosses a railroad track, at a point in a town where it would be illegal or improper for the railroad company to fence the track on either side of said crossing, on account of the rights or convenience of the public, the company is not required by law to place cattle-pits at the side of the crossing to keep cattle off the track."

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The evidence not being in the record, we have no means of knowing whether the above instruction was applicable to the case or not. If the evidence showed that the cattle were not killed and injured in a town, then the charge asked was correctly refused. The court below had the means of knowing, and we will presume did know, whether the charge applied to the case.

We are, therefore, of the opinion, that in the condition of the record, we cannot, under the long and well settled practice in this court, examine and determine whether the court erred in refusing to instruct as asked.

The judgment is affirmed, with costs.

D. D. Banta, C. Byfield, G. M. Overstreet, and A. B. Hunter, for appellant.

D. W. Howe, for appellee.

BASYE v. GOODMAN.

PRACTICE.—Set-off.—Rebutting Evidence.—Where a defendant in an action has introduced proof of a set-off, and the plaintiff introduces new matter in evidence in avoidance, the defendant has the same right to introduce rebutting proof, that he would have in an action on the matter pleaded as set-off.

APPEAL from the Henry Common Pleas.

. **DOWNEY, J.**—This action was commenced before a justice of the peace. The defendant pleaded a set-off. Upon a trial before the justice, the plaintiff was successful. On appeal to the common pleas he got a still larger judgment. The defendant is the appellant in this court. The cause of action and the set-off each consists of an account of several items. On the trial in the common pleas the court refused to allow the defendant to give rebutting evidence relating to his set-off. For instance, the defendant had charged in his set-off

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for medical services, and made proof of the services, and the reasonable value thereof. The plaintiff then gave evidence tending to show that the services were rendered under a special agreement, by which the defendant was to charge one-fourth less than they were reasonably worth. The defendant then proposed to disprove this special contract, but the court excluded his evidence. Again, the defendant had a charge for pasture for animals; and having proved the pasturing and its value, the plaintiff then gave evidence that on account of the fences being down, and the defendant failing to keep the same up, and other cattle depasturing the fields, he lost the use of the pasture. The defendant then offered to prove that the fences inclosing the pasture-fields were in good repair. This evidence was rejected.

These rulings of the court are the errors assigned. We think they were erroneous. The plaintiff had the right to open and close the evidence and argument; but it is not meant by this that the rebutting evidence of the defendant upon his set-off shall be excluded. If this were so, few defendants would be willing to risk the experiment of putting in a set-off. Where the defendant has given evidence of his set-off, in a case like this, and the plaintiff proves new matter by way of avoidance, the defendant has the same right to give rebutting evidence, that a plaintiff would have where the defendant meets his claim by that kind of defence. It may be that under this rule the defendant will close the evidence; but it is not necessarily so. Had the defendant, instead of using his claim as a set-off, brought an independent action upon it, there could scarcely have been two opinions about the right, under the circumstances, to give this evidence.

The judgment is reversed, with costs, and the cause remanded.

J. Brown and R. L. Polk, for appellant.

W. H. Carroll, for appellee.

ROBINSON v. THE BOARD OF COMMISSIONERS OF VANDERBURG COUNTY.

87	333
181	420
87	333
141	163

APPEAL. — *County Commissioners.* — One who is not a party to proceedings before the board of county commissioners cannot appeal from a decision of such board, unless he shall file in the office of the county auditor his affidavit, showing that he has an interest in the matter decided, and that he is aggrieved by such decision. If such an affidavit has not been filed, the court may dismiss the appeal.

SAME. — *Statute Construed.* — The phrase, "*a party to the proceeding,*" as used in the statute, 1 G. & H. 253, section 31, embraces such persons only, as are parties in a legal sense, and who have been made or become such in some mode prescribed or recognized by the law, so that they are bound by the proceeding.

APPEAL from the Vanderburg Common Pleas.

DOWNEY, J. — At the May term, 1869, the Board of Commissioners made and entered of record the following order:

"Now here, upon being sent for, comes A. L. Robinson, and states to the board that he has no time to make the report required of him by the board, nor to complete his investigations; and the board, in consideration of the course pursued by the said Robinson, and his failure to report the result of his examination to this board, ordered that all actions brought by the said A. L. Robinson for, and on the part of the county be and are hereby discontinued for the present. The board require of said Robinson a statement of the results obtained by his investigations; also a thorough examination of the reports filed by the county auditor; and the said Robinson is granted further time, viz., until the first day of June, 1869, to perform said work and make his report to this board; and the county auditor is hereby directed to furnish a copy of the foregoing to said Robinson and to the clerk of the court."

Without filing any affidavit setting forth that he had any interest in the matter decided, and was aggrieved by the decision, Robinson appealed from this order of the board to the common pleas.

In the common pleas, a bill of exceptions informs us, the

Robinson *v.* The Board of Commissioners of Vanderburg County.

defendant by counsel moved to dismiss the appeal for the reason that that court had no jurisdiction to try and determine the same, to which the plaintiff in person objected; and before the said motion was decided and while the same was pending, the plaintiff offered to prove by two members of the said board of commissioners, that the order of the said board appealed from herein was never passed by the said board, and that the same was entered of record in the records of said board, by the auditor of said county, without the consent or approbation of said board, which proof the court refused to hear, but dismissed the appeal at the costs of the plaintiff. He excepted.

The statute provides that "from all decisions of such commissioners there shall be allowed an appeal to the circuit or common pleas court, by any person aggrieved; but if such person shall not be a party to the proceeding such appeal shall not be allowed, unless he shall file in the office of the county auditor his affidavit setting forth that he has an interest in the matter decided, and that he is aggrieved by such decision, alleging explicitly the nature of his interest." 1 G. & H. 253, sec. 31.

We cannot say that the appellant was a party to the proceeding referred to, in any legal sense. It is true that he is named in the order. But that alone does not make him a party. The county had the undoubted right, so far as anything is made to appear, to order the dismissal of the suits brought by the appellant for and on the part of the county. We are of the opinion, then, that without an affidavit filed, showing the appellant had an interest in the matter decided, and that he was aggrieved by such decision, as required by the section of the statute above referred to, the court committed no error in dismissing the appeal.

The judgment is affirmed, with costs.

ON PETITION FOR A REHEARING.

WORDEN, C. J.—The appellant has filed an earnest petition for a rehearing in this cause, and we have given it a

careful consideration, but have arrived at the same conclusion as before. Some further observations, however, may not be out of place.

The statute, as has been seen, allows no one to appeal from the decisions of the board of commissioners, without the required affidavit, unless he be "a party to the proceeding."

There is no reason why the phrase, "a party to the proceeding," should not be construed in its ordinary legal meaning, and be held to embrace such persons only as are parties in a legal sense, and who have been made or have become such in some mode prescribed or recognized by the law, so that they are bound by the proceeding. The statute is quite liberal in giving any other person aggrieved the right of appeal on filing the affidavit.

Now, the question arises whether Robinson was a party to the proceeding in the legal sense of the term, so as to be bound thereby. If so, how did he become such? It is clear that he was not the mover in the proceeding, and did not occupy a position similar to that of a plaintiff in an action. If the proceeding was in its nature *ex parte*, Robinson was no party and not concluded by it. Assuming that the proceeding was of an adversary character, then, to make Robinson a party, he must have been brought in in some mode prescribed by law, or he must have voluntarily appeared to the proceeding. The record does not show that he became a party in either of these modes; or, in other words, that he was a party at all. The record does show, to be sure, that "now here, upon being sent for, comes A. L. Robinson, and states to the board that he has no time to make the report required of him by the board, nor to complete his investigations." Being "sent for" was no summons or notice to appear to an adversary proceeding, nor was his coming in and making the statement imputed to him by the record any appearance to such subsequent proceeding. The statement imputed to him had no necessary connection with the subsequent action of the board, nor does it appear that Robinson was advised

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of the intended proceedings. "There should be some formal entry, or plea, or motion, or official act, to constitute an appearance; and this should be of record, and tried by the record." *Scott v. Hull*, 14 Ind. 136.

It is quite clear to our minds that as Robinson was not made a party to the proceeding in any legal mode, and as he did not appear thereto, he was not a party thereto in any legal sense, nor is he bound thereby as a party.

The petition for a rehearing is overruled.*

A. L. Robinson and Parrett & Wood, for appellant.

*Original opinion filed April 20th, 1871. Opinion on petition for a rehearing filed December 22d, 1871.

McNIEL ET AL. v. DAVIDSON.

EVIDENCE.—*Admissions.*—*Attorney.*—In a suit by an attorney for his services, it is proper for him to testify as a witness to admissions made by the defendants, as to the amount realized by his successful defence of the action in which he was employed by them.

SAME.—*Opinions.*—There is no error in excluding evidence of a witness as to the value of services rendered by an attorney in a case, from his knowledge of what the services were, when he has stated that he cannot say what a reasonable fee would be; nor is it error to exclude such testimony, when it has not been shown that the witness offered is competent to state such value. Other persons, having knowledge on the subject, are competent witnesses, as well as lawyers. But a mere opinion is not evidence. There must be knowledge of facts which will give value to the opinion.

APPEAL from the Montgomery Common Pleas.

DOWNEY, J.—This suit was brought by the appellee against the appellants in the common pleas of Fountain county, and, after a change of venue, was tried in the common pleas of Montgomery county. The plaintiff recovered a verdict for nine hundred and ninety-nine dollars; there were successive motions for a *venire de novo*, for a new trial, and in arrest of judgment, all of which were overruled, and the defendants excepted. Judgment was then rendered.

The complaint was for services rendered by the plaintiff, as an attorney in certain enumerated actions, in pursuance of a written contract, alleged to have been worth two thousand dollars. Answer, general denial and payment. There was a demurrer to the complaint by the defendants, which was overruled, and this is assigned for error; but it is not urged here in argument, and we see no defect in the complaint. We may say the same as to the motion for a *venire de novo*, and in arrest of judgment. Several questions are presented, under the alleged error in refusing a new trial, which we will proceed to examine.

The first point relates to the refusal of the court to suppress certain depositions. But it is not shown by the bill of exceptions that any such motion was made when it should have been made, and for this reason we cannot say that there was any error. Such motions, as a general rule, must be made before entering into the trial. Sec. 266, 2 G. & H. 178.

The court allowed the plaintiff, over the opposition of the defendants, to testify to the admissions of John R. McNiel as to the amount realized by the McNiels by the defeat of the actions which he defended under the employment in question. There was no amount agreed upon which the plaintiff was to be paid for his services in defending the suits. It seems to us that the benefits conferred by the services of the attorney were proper to be considered in determining the amount of the compensation. It was, however, only one of the elements or circumstances entering into the question. The same may be said of the testimony of another witness on the same subject.

The defendants introduced Judge Cowan, who presided in the circuit court in which the suits in question were tried, and he testified to the various steps taken in the cases, that he was a lawyer, and had been judge for twelve years, and acquainted with the services rendered, but could not say what a reasonable attorney's fee would be; and they then asked him

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his opinion, from his knowledge of the services rendered, what they were worth, expecting to prove by him that they were worth only two hundred dollars. The plaintiff objected to his testifying, on the ground that he was not an expert, and his testimony was excluded. The defendants reserved the question. We do not regard the question as to the value of services by an attorney as one of science or skill for the testimony of experts. Any one who knows what the customary and usual charges of lawyers are can testify. But Judge Cowan having expressly said that he could not state what would be a reasonable fee, on account of the length of time since he had practised, we cannot say that it was error to refuse to take his mere opinion, not based on any knowledge of the customary charges then prevailing.

John R. McNiel and Scott McNiel, defendants, having testified to the facts with reference to the services rendered, were not allowed to give an opinion as to the value of such services, and this point was reserved by proper exception.

These witnesses were not requested to state, and did not state, whether they had any knowledge as to the usual amount charged for attorney's fees or not. The compensation to an attorney, for services rendered, should, like the pay for services of any one else, be fixed, in the absence of a special agreement relating thereto, by the usual and customary rate of charges for similar services, and not by a mere opinion, not based upon any facts. It is not a question, however, upon or with reference to which lawyers alone can testify. But as it was not shown that the defendants had any knowledge on the subject, we cannot say that it was error to refuse to allow them to give a mere opinion.

There is a question whether the written reasons for a new trial are properly in the record or not; but we have regarded them as being properly part of the record.

Affirmed, with costs.

G. McWilliams, for appellants.

T. F. Davidson, for appellee.

URTON ET AL. v. THE STATE.

PLEADING.—*Striking Out.*—Where the general denial is pleaded in answer, a paragraph of the same answer, only setting up matters that may be given in evidence under the general issue, may be struck out on motion.

SAME.—*Complaint.—Recognizance.*—In a suit upon a recognizance, the complaint must show that the principal in the recognizance was called and defaulted.

SAME.—In a suit upon a recognizance taken before a justice of the peace on a charge for the commission of a felony, the record must show that the forfeited recognizance, with the justice's certificate indorsed thereon, was filed with the clerk of the circuit court.

APPEAL from the Randolph Common Pleas.

PETTIT, J.—This suit was brought by the appellee against the appellants on a recognizance taken before a justice of the peace, alleged to have been forfeited, for the non-appearance of Urton on a criminal charge against him pending before the justice.

A demurrer to the complaint for want of sufficient facts was overruled, and exception to this ruling taken.

The defendants filed their answer in two paragraphs. First, general denial. The substance of the second paragraph is, that the recognizance was never forfeited; that on the day set for the appearance, the defendant in that suit was not called to come into court, nor were his securities called to produce him in discharge of the recognizance; that the cause was not called for trial on that day or at any other time. On motion of the appellee, the second paragraph was stricken out, on the ground that it only amounted to the general denial, and that all the matters set up in it could be given in evidence under the general denial. This ruling was excepted to, and is assigned for error; but we think the ruling was right. There was a trial by the court, motion for a new trial overruled, and exception, and judgment for the appellee for the penalty of the recognizance.

The assignments of error are numerous in form, but in fact or law they only amount to three; first, the overruling

Urton *et al.* v. The State.

the demurrer to the complaint; second, the striking out the second paragraph of the answer; this assignment we have already disposed of; third, the refusal to grant a new trial. Under this last a number of questions are raised and argued in the appellants' brief.

Under the first assignment it is insisted, that as the complaint does not show that the defendant, Urton, was three times called and failed to appear, the complaint is bad. *Lingley v. The State*, 1 Blackf. 559; 1 Chitty Crim. Law, 106; and Bicknell's Crim. Pr. 63, are cited. We have examined these authorities, and we hold that the complaint was insufficient, and the demurrer should have been sustained.

The offence charged before the justice of the peace was obtaining goods by false pretences, and was, therefore, a felony.

The record does not, in either the transcript or complaint, show that the supposed forfeited recognizance, or justice's certificate indorsed thereon, was filed in any court. The law requires the filing in the circuit court if a felony is charged, and in the common pleas court if a misdemeanor is charged; and we think this an essential requisite before a suit can be maintained upon a forfeited recognizance taken before a justice. 2 G. & H. 639, sec. 15.

There are other defects in the complaint, as well as errors in the admission of evidence, but we do not think it is necessary to trace or point them out further.

The judgment is reversed, with instructions to the court below to sustain the demurrer to the complaint, and allow both parties to amend their pleadings, at costs of appellee.

J. Watts, E. B. Reynolds, and M. Way, for appellants.

D. M. Bradbury and B. W. Hanna, Attorney General, for the State.

Kessinger *et al.* v. Kessinger *et al.*

THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS RAILROAD
COMPANY v. TULL.

JURY. — *Value.* — *Evidence.* — *Finding.* — A jury need not fix the value of personal property at the exact sum testified to by any one witness or by any two, but may find an intermediate sum.

APPEAL from the Bartholomew Circuit Court.

DOWNEY, J. — The appellee sued the appellant for the value of a cow killed on the road of the appellant.

The alleged value of the cow was seventy-five dollars. The jury found for the plaintiff and assessed his damages at seventy-three dollars.

A motion for a new trial was made for the reason, among others, that the damages were excessive. This motion was overruled, the defendant excepted, and put the evidence in the record by a bill of exceptions.

The only error well assigned is, that the court improperly refused a new trial.

The sole ground relied upon in the brief of appellant's counsel is, that the damages were excessive. Two witnesses put the value of the cow at seventy-five dollars, two swear that she was worth sixty dollars, one put her value at forty-five dollars, and one at forty dollars. We think the jury was not bound to fix the value at the exact amount named by any witness, or any two of them, but might find as they did.

The judgment is affirmed, with ten per cent. damages and costs.

S. Stansifer, for appellant.

R. Hill and G. W. Richardson, for appellee.

KESSINGER ET AL. v. KESSINGER ET AL.

WILLS — *Undue Influence.* — *Wife.* — An influence in procuring the execution of a will, which when exercised by a wife may be lawful and proper, may be illegitimate and undue when exercised by a woman living in unlawful intercourse with the testator.

Kessinger et al. v. Kessinger et al.

APPEAL from the Henry Common Pleas.

WORDEN, C. J.—This was a complaint by the appellees against the appellants, to set aside the last will and testament of Daniel B. Kessinger, deceased, and the probate thereof.

The grounds of contest are stated to be, “first, that at the time of the execution of the supposed will the testator was of unsound mind; and, second, that the execution of the will was brought about and obtained by the fraud and undue influence of Catharine Kessinger, Reuben Kessinger, and his wife, Hannah Kessinger.

Issue, trial, verdict, and judgment for the plaintiffs below.

The following is the verdict of the jury:

“We, the jury, find for the plaintiffs, on the grounds, first, that Daniel B. Kessinger was of unsound mind at the time the will was executed; second, undue influence; such as Catharine Kessinger, a short time before the will was executed, said she would have the will made to suit her this time. Also Reuben Kessinger, a short time before the will was executed, told Daniel B. Kessinger that his son George Kessinger had been trying to rob him, Daniel B. Kessinger.”

Complaint is made by the appellants of error in the admission of two items of evidence. First, in the evidence of Susannah Myers. She was asked a question which the record shows was “objected to but allowed.” The record does not show that any ground of objection was pointed out to the court, nor that any exception was taken to the ruling.

The other item is the introduction of a previous will prepared by the direction of the testator. The same observation may be made in reference to this as to the above. In respect to this item the record is as follows:

“Exhibit B,” the will, “offered in evidence, objected to by the defendants, objection overruled, and read in evidence, to wit,” etc.

This is contained in the bill of exceptions, but it is not shown that any ground of objection was pointed out, or any exception taken.

No authorities need be cited to show that no question is

properly reserved for our decision, arising upon the introduction of the evidence.

The appellants asked, but the court refused, the following instruction.

“If the jury believe from the evidence that the wife of the deceased died some thirty or forty years ago, and the deceased and Catharine Kessinger commenced living together about that time, and continued to live together up and until the death of the testator, and had children born to them and raised them up, the fact as to whether the deceased and Catharine were ever married or not makes no difference in this case, and should not be regarded by the jury, or taken into the account in determining any issue in this case.”

It will be remembered that one of the objections made to the will was, that it was procured by the undue influence of Catharine Kessinger. The charge asked, it may also be observed, was relevant to the case made by the evidence; therefore, if it contained a correct statement of the law, it should have been given. We are not able to see that the fact of marriage or absence of marriage, between the testator and Catharine, could have anything to do with, or have thrown any light upon, the question as to the testator's soundness of mind. But the charge was broad and covered all the issues in the cause; and hence, if the fact was in any way material on the issue of undue influence, the charge, in the broad terms in which it was asked, was correctly refused.

If the law be, that whatever influence may be rightfully and duly exercised by a wife in procuring the execution of a will by her husband may also be rightfully and duly exercised by a woman with whom a man is living in a state of adultery, then the charge should have been given; otherwise not.

We are of opinion that there is a difference in the two cases, and that an influence when exercised by a wife might be lawful and legitimate, but which, if exercised by a woman occupying merely an adulterous relation to the testator, might be undue and illegitimate. This must be so from the very nature of civilized human society, and the

domestic relations of life. Without entering upon any general discussion of the question, we content ourselves with a reference to the authorities which support this view. 1 Redf. Wills, pp. 531-2-3; *Dean v. Negley*, 41 Penn. St. 312; *Monroe v. Barclay*, 17 Ohio St. 302; *Delafield v. Parish*, 25 N. Y. 9. It follows that the charge asked was correctly refused.

There were several other instructions asked by the appellants and refused, all bearing on the question of undue influence, and having no relation whatever to the testator's soundness or unsoundness of mind. We have not examined these instructions carefully, with a view to determine their correctness for the reason that if error was committed in refusing them, the error cannot reverse the judgment.

If the testator was of unsound mind at the time of the execution of the will, as was found by the jury, the will cannot stand, whatever may be the result of the issue on the alleged undue influence. Had that issue been found for the appellants, or had there been no charge of undue influence in the complaint, the verdict of unsoundness of mind on the part of the testator, if permitted to stand, is decisive against the will. One fatal objection to the will destroys it as effectually as many.

It is claimed that the verdict, finding the testator to have been of unsound mind at the time of the execution of the will, is not sustained by, and is contrary to, the evidence. The evidence on this point is conflicting. Perhaps it predominates against the verdict. There is, however, considerable evidence which sustains the verdict. The will was executed April 10th, 1867. Dr. James H. Walker was a physician who attended the testator in his last sickness. He had known the deceased four years before his death, and attended him as his physician in April and May, 1867, and for about a year prior thereto. The deceased died of dropsy and paralysis; and was, in the opinion of the witness, of unsound mind during the latter part of his acquaintance with him. G. T. Simpson testified that he had known the deceased for twenty-five years. Was of opinion he was

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not sane. Discovered it on going with him to Newport, Ky., to see a physician. On the way, the deceased forgot the business on which, and the place to which, they were going, until reminded of them by the witness. Other witnesses express opinions of the testator's unsoundness of mind, based on facts stated, some of which would be quite unlikely to occur with a man of sane mind. On the other hand, there is a good deal of evidence tending to show the testator's sanity. In this conflict we cannot disturb the conclusion arrived at by the jury on this point.

There is no error in the record, for which the judgment can be reversed.

The judgment below is affirmed, with costs.

B. F. Claypool, J. Brown, and T. B. Redding, for appellants.

J. H. Mellett and M. E. Forkner, for appellees.

37	345
128	510

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37	345
171	457

ADMINISTRATOR.—*Removal.—Practice.*—In a proceeding to remove an administrator on the ground that he has failed to make a true and complete inventory of the estate of the decedent, no other pleadings are authorized than the sworn application. The only judgment the court can render is one removing or refusing to remove. The statute is simply mandatory, and the action of the court on the application is very much within the discretion of the judge.

APPEAL from the Jennings Common Pleas.

BUSKIRK, J.—This was a proceeding on the part of the appellant to remove the appellee as administrator of the estate of James Tobias, deceased, on the ground that he had failed to make a full, true, and complete inventory of the estate of the said decedent. The proceeding is based upon section 22 of the act for the settlement of decedents' estates. 2 G. & H. 491.

The application was sworn to. The appellee filed an answer in eight paragraphs. The appellant demurred to some, and moved to strike out others, of such paragraphs, which

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were overruled, and exceptions were taken, when replies were filed. These rulings are assigned for error.

We are of the opinion that, in such a proceeding as this, no other pleading than the sworn application is authorized. The answer, demurrers, motions to strike out, and the replies will be regarded as stricken from the record.

The cause was tried by the court and resulted in a finding for the appellee. A motion for a new trial was overruled, and an exception taken.

The evidence is embodied in a bill of exceptions. The evidence is very voluminous and conflicting. The trial seems to have been conducted on the theory that it was a proceeding to compel the administrator to account for the articles not inventoried, but such is not the case. The only judgment that the court could render in this proceeding was either removing or refusing to remove the administrator. When the administrator submits his report, the appellant or any other person interested in the estate can file exceptions to the confirmation of the report, or an independent proceeding may be instituted for that purpose.

It is quite manifest, from the evidence, that the appellee failed to make a full and complete inventory of the estate of the decedent, but this seems to have been caused more by bad advice than from any intention to defraud the estate. The laws of Congress or the rules and regulations of the army can have no weight in the courts of this State in reference to the settlement or distribution of the estate of a person subject to the laws of this State. The estate of the decedent must be settled under, and in conformity with, the laws of this State.

It is provided by the section upon which this proceeding is based that the court may remove an administrator for a failure to inventory the estate. It is not mandatory on the court. It is very much within the discretion of the common pleas court.

It was said by this court, in *Whitehall v. The State*, 19 Ind. 30, that "when we consider the supervisory power of the pro-

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bate court, which our common pleas is, over executors, administrators, and guardians, and the duty resting upon that court to vigilantly exercise it, taken in connection with the amount of personal knowledge in the premises, which the court will generally, as a matter of course, possess, it will at once be conceded that, in a doubtful case, this court should not interfere with the action of the court below."

We think this case comes within the principle above laid down. The evidence is so conflicting that we would not have been inclined to interfere with the finding of the lower court if the administrator had been removed. We do not think there was such an abuse of the sound legal discretion vested in the court below as would justify us, under the rules and practice of this court, in disturbing the finding.

The judgment is affirmed, with costs.

H. W. Harrington and *C. A. Korbly*, for appellant.

C. E. Walker, for appellee.

FOY ET AL. *v.* THE BOARD OF COMMISSIONERS OF RIPLEY COUNTY.

COUNTY AUDITOR.—*Delinquent List*.—The county auditor was power to make a contract for the publication of the delinquent taxes; and where such contract is made, although the publication be not in time, yet if this results not from fault in the publisher, he is entitled to recover from the county on his contract.

APPEAL from the Ripley Common Pleas.

DOWNEY, J.—The appellants, the board having refused to allow their claim, sued the appellee to recover for printing and publishing the list of delinquent taxes. The defendant, in addition to other answers which were held bad on demurrer, pleaded, first, the general denial; and, second, that the newspaper of the plaintiffs in which the notice was published

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was not of general circulation in the county. After a denial of the second paragraph of the answer, the cause was tried by a jury, and there was a verdict for the defendant. The plaintiffs moved for a new trial, for the reason, among others, that the evidence was not sufficient to sustain the verdict. This motion was overruled, the plaintiffs excepted, and final judgment was rendered for the defendant. The evidence is in the record.

We have examined the evidence, which is properly in the bill of exceptions (we cannot consider the original newspapers appended to the record as part of it), and think that a new trial should have been granted. The contract made with the plaintiffs by the county auditor, for the publication of the delinquent list, is clearly proved. The auditor had power to make the contract. The law intrusts that duty to him. 3 Ind. Stat. 518, sec. 143.

The work was done; and though not done in the best style of the art, as shown by the evidence, it was done reasonably well, and to the satisfaction and acceptance of the auditor, as he testifies.

The notice is dated January 9th, 1867, and it was inserted in the issues of January 9th, 16th, 23d, and 30th. The sale was to take place on the first Monday of February, 1867. If this publication was not in time to justify the sale at that date, we do not think the printer should, on that account, lose the pay for the work. He seems to have published it as soon as he could do so, after it was made out and furnished to him by the auditor. If the auditor was guilty of an omission or violation of duty in not preparing the list for publication in time, or in causing it to be published at such time as would not be legal notice of the sale, let him answer as to that.

If it was necessary that the plaintiffs should make proof that the newspaper had general circulation in the county, after the auditor had made choice of it in which to publish the list, had made the contract, and the work had been done, then we think the evidence on that point was sufficient. A

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competent witness, who was acquainted with the facts, testified that the paper had subscribers in every township in the county, and that its circulation amounted to two hundred and fifty copies. Several other witnesses testified that the paper had a general circulation in the county.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial, and for further proceedings.

S. M. Jones, J. W. Gordon, T. M. Browne, and R. N. Lamb, for appellants.

JENKINS, Assignee, v. FLINN.

HUSBAND AND WIFE.—Agent.—Liability of Husband.—Where a wife engages in business, with the knowledge and consent of her husband, the business is regarded as that of the husband, and the wife is regarded as his agent, and he is bound for the performance of contracts which she may make relating to such business; but where the wife incurs the indebtedness, and the credit is given to her exclusively, and there can, therefore, be no presumption that she was acting as the agent of the husband merely, the husband is not liable.

APPEAL from the Cass Common Pleas.

DOWNEY, J.—This action was commenced by Thompson and McClellan, and after their bankruptcy, prosecuted by Jenkins, as the assignee in bankruptcy of their estate, against Elijah Flinn, the appellee, and his wife, Charlotte Flinn, before a justice of the peace to recover for goods sold and delivered. The defendants, having made default before the justice of the peace, appealed to the common pleas, where she pleaded, separately; first, the general denial; second, coverture, and that she had no separate property; third, coverture, and that she did not promise to pay the same out of her separate estate; and he pleaded, first, the general denial; second, that the goods were purchased by his wife without his

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knowledge or consent, and were not necessities furnished her by the plaintiffs. Reply in denial of the second and third paragraphs of the answer of Mrs. Flinn, and of the second paragraph of Flinn's answer.

There was a trial by the court, and at the conclusion of the evidence the plaintiff dismissed the action as to Mrs. Flinn. The court found, on the evidence for the other defendant. The plaintiff moved for a new trial on the ground of the insufficiency of the evidence to sustain the finding, which motion was overruled, and judgment rendered for the defendant.

The only error properly assigned calls in question the correctness of the ruling of the court in refusing to grant a new trial.

As the evidence is not long, we will set it out in full. It was agreed that the defendant Charlotte E. Flinn was a milliner, doing business in Logansport, Indiana; that the complaint correctly expresses the price the said defendant agreed to pay for the goods; that she received them and agreed to pay for them; that at the time they were purchased she and her co-defendant were husband and wife, living together in the back part of the same house in which the milliner shop was kept. This agreement constituted the plaintiffs' evidence.

The defendant Elijah Flinn testified in his own behalf as follows: "I never bought anything of the plaintiffs, nor ever agreed to pay them anything, and had no knowledge of the purchase of these goods that I remember of; I never had anything to do with the milliner shop or the proceeds or profits; never received anything from it." On cross examination he testified as follows: "My wife has been carrying on the millinery business since 1861; we have lived together all the time; the shop was in the front room of our dwelling-house; my wife attended to that business, and I attended to mine; I occasionally saw the bills of goods purchased by her lying about; do not know of seeing the bill of these goods, or know of her purchasing them; I occasionally passed through the millinery shop; she had no separate estate or

fund from which to make purchases; she always got her own clothing; we have three children, and she would sometimes get things for the children; I have paid debts of hers, about four hundred dollars at one time, and about one hundred and fifty dollars at another, within the last two years." This was all the evidence on behalf of the defendant.

Was this evidence sufficient to show a legal liability on the part of the husband to pay for the goods? According to the common law rule, the earnings of the wife are always the property of the husband just as much as are the earnings of his own hands. Bishop Married Women, sections 21, 212, 886; *Baxter v. Prickett's Adm'r*, 27 Ind. 490. He was entitled to her earnings, because he was bound for her support, and this whether she earned much or little. Bishop Mar. Women, sec. 887.

If she engage in any trade or business, the profits of such trade or business belong to the husband, for they are as much the earnings of the wife as any other income produced by her labor or skill. *Id.* sec. 733; *Switzer v. Valentine*, 4 Duer, 96.

This rule is still in force in Indiana, as a part of the common law. The statute provides, that the lands of a married woman and the profits thereof shall be her separate property, as fully as if she was unmarried. 1 G. & H. 374, sec. 5. It is also provided, that "the personal property of the wife held by her at the time of her marriage, or acquired during coverture, by descent, devise, or gift, shall remain her own property to the same extent and under the same rules as her real estate so remains; and on the death of the husband before the wife, such personal property shall go to the wife, and on the death of the wife before the husband, shall be distributed in the same manner as her real estate descends, and is apportioned under the same circumstances." Acts 1853, p. 57, copied in note to p. 295, 1 G. & H. It will be seen that this statute reached only to such personal property of the wife as she had at the time of the marriage or acquired during the coverture by descent, devise, or gift;

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thus leaving, as we think, the common law rule with reference to the husband's right to the wife's earnings unchanged. *Baxter v. Prickett's Adm'r, supra.*

It follows that if the wife engage in trade and purchase goods to be used or sold in such trade, they become the property of the husband, unless purchased with money acquired and belonging to her as above stated. *Switzer v. Valentine, supra*; *Glann v. Younglove*, 27 Barb. 480; *Lovett v. Robinson*, 7 How. Pr. 105.

As the wife holds her separate property as fully as if she was unmarried, we suppose she may engage in and carry on business therewith, with the assent of the husband, and be entitled to the profits which she may make as an increase of her separate estate. But she can not bind herself for goods purchased as a *feme sole* can do. *Hasheagen v. Specker*, 36 Ind. 413.

Where the wife engages in business, with the knowledge and consent of the husband, the business is regarded as that of the husband, the wife as his agent, and he as bound for the performance of contracts which she may make, relating to such business. *Abbott v. Mackinley*, 2 Miles, 220; *Glann v. Younglove, supra*; *Cropsey v. McKinney*, 30 Barb. 47; *Mackinley v. M'Gregor*, 3 Whart. 368; *Godfrey v. Brooks*, 5 Harring. Del. 396; *Rotch v. Miles*, 2 Conn. 638; *Switzer v. Valentine, supra*; *Chitty Con.* 184; 2 Bright Hus. & Wife, 300, sec. 20.

As a qualification of the rule last stated, it seems to be satisfactorily established by the cases, that where the wife incurs the indebtedness, and the credit is given to her exclusively, and where therefore there can be no presumption that she was acting as the agent of the husband merely, the husband is not liable. *Bentley v. Griffin*, 5 Taunt. 356; *Carter v. Howard*, 39 Vt. 106; *Moses v. Forgartie*, 2 Hill S. C. 335; *Swett v. Penrice*, 24 Miss. 416.

The theory upon which the husband is bound to pay for necessities purchased by the wife is, that the wife is his agent for the purpose of purchasing such articles as may be

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necessary, while the parties live together. *Litson v. Brown*, 26 Ind. 489.

Proceeding to examine the facts of the case under consideration in view of these legal propositions, we find that by the evidence it is shown that the husband knew that the wife was engaged in business, to some extent he derived a profit from the business, the wife supporting herself and contributing to the support of the children, which, otherwise, he would have been compelled to. He had paid \$550.00 of her debts, but whether on account of this business or not is not shown.

On the other hand, it is shown, by the agreed statement of facts, that she received the goods and agreed to pay for them; and he testifies that he never bought anything of the plaintiffs nor ever agreed to pay them anything; that he never saw the bill of the goods or knew of their purchase. It is not shown that the credit was given to the husband, or even that the plaintiffs knew that there was any such person in existence.

After some hesitation, and without any very firm conviction that we are right, we have come to the conclusion that we ought to hold that the credit in this case was given to the wife, and that we can not infer from the circumstances an agency in the wife and a liability of the husband.

Judgment affirmed, with costs.

R. E. Jenkins and *D. P. Jenkins*, for appellant.

H. C. Thornton and *D. B. McConnell*, for appellee.

TAULMAN v. THE STATE.

HUSBAND AND WIFE.—*Witness.*—*Criminal Law.*—*Affidavit.*—In a prosecution under the act of February 23d, 1859, for carrying concealed weapons, the wife of the defendant cannot be a witness against him; and therefore a wife cannot make an affidavit against her husband on which to found such a prosecution.

APPEAL from the Jefferson Criminal Court.

DOWNEY, J.—This was a prosecution against the appellant, under the act of February 23d, 1859, 2 G. & H. 480, with reference to the carrying of concealed weapons. The prosecution was commenced before a justice of the peace, upon an affidavit made by the wife of the appellant, was appealed to the criminal court, and thence to this court.

The only question which we need to consider is, whether the wife is competent to make an affidavit against her husband on which to commence a prosecution in such a case. The language of the statute is, "that every person not being a traveller, who shall wear or carry any dirk, pistol, bowie-knife, dagger, sword in cane, or any other dangerous or deadly weapon concealed, or who shall carry or wear any such weapon openly, with the intent or avowed purpose of injuring his fellow man, shall, upon conviction thereof, be fined in any sum not exceeding five hundred dollars."

All persons competent to testify in civil actions, the party injured by the offence committed, and accomplices, when they consent to testify, are competent witnesses in criminal cases. 2 G. & H. 410, sec. 90. It has been held, however, that the first clause of this section extends to such persons only as were competent to testify in civil actions at the time when the criminal code took effect, and that therefore the defendant in a criminal case cannot testify. *Hoagland v. The State*, 17 Ind. 488. Why there should be a difference made between civil and criminal actions in this respect, may not be very apparent. In a civil action, one who has committed the greatest crime, even though he may have been convicted of it, may testify for another, or for himself; while one who is merely charged with crime in a criminal case, must not open his mouth in his own excuse or justification. In a civil action, in which any, even the smallest, amount is involved, the right has been secured to the party to testify; while in a criminal action in which the liberty or the life of the defendant is in jeopardy, he must remain silent.

According to the common law, as well as by the statute

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of this State, husband and wife are incompetent witnesses for or against each other, and they cannot disclose any communication from one to the other, made during the existence of the marriage relation, whether called as a witness while that relation exists or afterward. 2 G. & H. 170, sec. 240. Notwithstanding this general rule of the common law, and notwithstanding, also, our statute on this subject, the wife may be a witness against the husband in a few instances. Among these are cases for surety of the peace against her husband, 2 G. & H. 642, sec. 29, and assault and battery committed by the husband upon the person of the wife, 3 Ind. Stat. 560, sec. 2. There may be other exceptions to the rule.

We think, however, that in a prosecution under the statute above quoted, for carrying weapons, either concealed or openly, the wife cannot be a witness against the husband, and that, therefore, she cannot make an affidavit against him on which to found such a prosecution.

The judgment is reversed, and the cause remanded.

C. E. Walker and *W. S. Roberts*, for appellant.

B. W. Hanna, Attorney General, for the State.

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PRACTICE.—*Affidavits*.—*Bill of Exceptions*.—Affidavits in support of motions for postponement of trial and for change of venue must be made part of the record by bill of exceptions.

APPEAL from the Shelby Circuit Court.

PETTIT, J.—This was an indictment for an assault and battery, with intent to murder one David Hoover.

Plea of not guilty; trial by the court; finding of guilty; imprisonment for eight years, and one dollar fine and costs; motion for a new trial overruled; and judgment on the finding.

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The errors assigned are, first, in not granting the appellant a postponement of his cause for six hours, as asked for by him, to prepare for his defence; second, in refusing to allow the appellant to file additional affidavits in support of his motion for postponement; third, in refusing the appellant a change of venue; fourth, in refusing to allow the appellant to file additional affidavits in support of his motion for a change of venue; fifth, in overruling the appellant's motion for a new trial.

There is no affidavit or other paper in the record, by bill of exceptions, in relation to the first, second, third, and fourth assignments of error; and they are not properly or legally parts of the record, unless made so by bill of exceptions, nor can this court take notice of them, although the clerk may have copied them into the transcript. We will not cite authorities, but we refer the curious inquirer on this question to the Digests and Reports of our own State, from which we believe he will be fully satisfied as to the correctness of this ruling.

This leaves remaining the sixth, that of overruling the motion for a new trial, for consideration. The evidence is set out in the bill of exceptions, and it consists of the testimony of one man, the injured party. It is clear, conclusive, and leaves not a doubt on our minds of the correctness of the finding and judgment of the court below.

The judgment is affirmed, at the costs of the appellant.*

K. M. Hord, A. Blair, J. T. Hockmon, and L. J. Hackney,
for appellant.

N. T. Carr and B. W. Hanna, Attorney General, for the State.

*Petition for a rehearing overruled.

WAGGONER ET AL. v. LISTON.

PLEADING.—*Denial.*—*Demurrer.*—Where there is a denial of a complaint, it is not error to sustain a demurrer to a paragraph of answer which states facts which simply amount to a denial.

PRACTICE.—*Weight of Evidence.*—That the finding is against the weight of evidence, is no ground for reversing a judgment.

SAME.—*Reasons for New Trial.*—*Too General.*—That the court erred in giving or refusing instructions, or in receiving or rejecting evidence, are reasons too general in their statement to present any question on appeal. The instructions or the evidence should be pointed out.

SAME.—*Demurrer.*—The ruling on a demurrer is no ground for a new trial.

APPEAL from the Wabash Common Pleas.

DOWNEY, J.—This was an action by the appellee against Waggoner and Steinberger, to recover the possession of forty barrels of whiskey, the property and right to the possession of which were alleged to be in the plaintiff, and of which it was alleged the defendants had possession, and unlawfully detained from the plaintiff. There was an answer by the defendants, reply thereto, trial by jury, verdict for the plaintiff, motion for a new trial overruled, and judgment on the verdict.

The following are the errors assigned:

“First, overruling demurrer to complaint; second, in sustaining demurrer to pleas; third, in excluding defendants’ evidence; fourth, in admitting plaintiff’s evidence; fifth, in overruling motion for new trial; sixth, in giving charges to the jury; seventh, in refusing charges to the jury.”

We see no objection to the first and fifth assignments of error, and the second may be sufficient, if we are allowed to understand from the word “pleas” that the paragraphs of the answer were intended. The conclusion to which we have arrived, however, with reference to this alleged error renders it unnecessary that we should be very accurate in this matter. The third, fourth, sixth, and seventh assignments raise no question in this court. They are embraced in the fifth, if they were urged as reasons for a new trial.

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134	113

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First, the objection to the complaint is not followed up by counsel in their brief. They point out no defect in it. We have examined it, and think it sufficient. Second, the defendant Steinberger did not plead. Waggoner answered in eleven or twelve paragraphs, and among them the general denial. The first, second, and third, to which demurrers were sustained, were each a statement of facts intended to show that the plaintiff was not the owner and entitled to the possession of the whiskey. The facts were fully put in issue by the general denial of the complaint. This ruling cannot, therefore, be successfully assigned for error. Third, the fifth assignment of error requires us to examine the reasons assigned for a new trial. They are as follows: "First, that the finding of the jury is against the law; second, that the finding of the jury is against the weight of the evidence; third, that the court erred in its charges given to the jury; fourth, that the court erred in refusing to give to the jury charges asked to be given by defendants; fifth, that the court erred in refusing to allow evidence which the defendants produced and offered to the jury; sixth, that the court erred in allowing evidence on behalf of the plaintiff over the defendants' objection; seventh, and Steinberger, defendant, adds to the foregoing, that the court refused him the conclusion of the argument; eighth, the court below erred in sustaining demurrers to the defendants' answer, which are stated in the record."

What state of case would require the court to grant a new trial under the first reason assigned is not very definitely settled. It is freely used by counsel, occurring as a reason in the motion in almost every case where a motion is made. But, in a limited examination, we have found no case in this court where a new trial has been granted, for this reason. We will not say that there may not have been cases, or that they may not occur hereafter. But see *Bosseker v. Cramer*, 18 Ind. 44. Counsel state no ground on which a new trial should have been granted in this case for this reason.

The second reason for a new trial is not any of the reasons for which the court was authorized by statute to grant

a new trial. The statutory reason for granting a new trial on account of a defect of evidence is, "that the verdict or decision is not sustained by sufficient evidence." But if the common pleas could have granted a new trial because the verdict was "against the weight of the evidence," and refused to do so, this court could not reconsider that question. In *The Indianapolis, etc., Railroad Co. v. Trisler*, 30 Ind. 243, this court said, repeating, in substance, what had many times before been said: "The appellant argues the case as if this court were to weigh the evidence and determine the preponderance thereof. Such is not our province. It must appear by the record, not merely that the finding below was against the weight of evidence, but that that finding was wrong beyond any question whatever, before we can interfere upon the evidence alone." If the reason had been in the statutory form, we would have examined the evidence; but as it is implied by the form of the reason given that there was some evidence on which the jury might have found as they did, and as the question is only as to the weight of the evidence, we cannot pass upon that question.

The next reason for a new trial was that the court erred in its charges given to the jury. This reason is indefinite. The court cannot, under such an objection, be required to search among the instructions given for the erroneous charges. In *Dawson v. Coffman*, 28 Ind. 220, in sustaining a reason more specific than this, this court overruled or questioned several cases previously decided, under which it would probably have been insufficient. This reason is not sufficiently specific to present any question. According to the case to which we have referred, if the motion had designated the objectionable charges as those to which the party had excepted, it would have been sufficient. All the charges given cover nine pages of the record. We do not know where to look for the erroneous charges.

The fourth reason was, that the court refused to give to the jury charges asked to be given by the defendants. Here again no charges are designated. Whether these charges

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thus refused are in the record or not, we do not know. Whether there was an exception to this refusal to give these instructions or not, we are not informed.

The fifth reason was, that the court refused to allow evidence which the defendants produced and offered to the jury; and the sixth was that the court allowed evidence on behalf of the plaintiff over the defendants' objection. What evidence was refused? Is it in the bill of exceptions, or not? Was it the testimony of some witness, or was it documentary evidence? If the common pleas could know, we certainly cannot. What evidence was improperly admitted? The evidence covers fifty-five pages of the record.

Not even in their brief have counsel for the appellants pointed out any instruction as erroneous, or any piece or part of the evidence which they allege was rejected or admitted improperly.

The seventh reason for a new trial is by Steinberger alone, and is, that the court should have allowed him to close the argument. The record does not show that he had any answer in, or that he in any way contested the plaintiff's claim to the property. Why he should have had the closing speech in the argument, we are not informed. We think there is no foundation for this claim.

The eighth reason for a new trial was, that the court improperly sustained demurrers to the defendants' answers. This was no reason for a new trial. It had nothing to do with the trial of the case.

The judgment is affirmed, with costs.

J. U. Pettit and T. T. Weir, for appellants.

J. D. Conner, W. Morrow, and N. Trusler, for appellee.

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TAFTE.

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134	688
136	186

PRACTICE.—*Reversal on Evidence.—Rule Upon Motion for New Trial.*—A judgment will not be reversed upon the mere weight of evidence, by the Supreme Court, unless upon a material point upon which the evidence is all documentary. Where there is evidence, which, if it were uncontradicted, would be sufficient to support the finding, the judgment will not be reversed on the evidence. This rule must not be applied in the court trying the cause.

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169	461

PLEADING.—*City Ordinance.—Negligence.*—In an action against a railroad company, for an injury caused by negligence in running its cars, a copy of a city ordinance limiting the speed of trains need not be filed with the complaint, to authorize its introduction in evidence; an averment of its existence is sufficient.

SAME.—*Evidence.*—Such an ordinance, under the allegations of such a complaint, was held admissible, to prove that the defendant was guilty of negligence, and proper for the jury to consider in determining whether the plaintiff was without fault.

NEGLIGENCE.—*Railroad.—Street Railroad.—Instructions.*—Instructions upon the degree of care to be exercised by the controller of a railway train and the conductor of a street car, at a crossing, are set out and commented upon in the opinion.

APPEAL from the Marion Circuit Court.

BUSKIRK, J.—The appellee sued the Madison and Indianapolis Railroad Company and the Union Railway Company. The complaint alleged, that on the 20th day of December, 1865, in the corporate limits of the city of Indianapolis, he was engaged as the conductor of a car of the Citizens' Street Railway Company, then being run upon the track of said street railway company, upon Virginia Avenue, a street of said city.

That, while acting as such conductor upon a car of said street railway company, at the point where the track of the street railway crosses the track of the said Union Railway Company, the same being also the point at which Alabama street crosses said Avenue, and while standing upon the platform of said street railway car, said Madison and Indianapolis Railroad Company so carelessly and negligently run

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a certain train of platform cars upon said Union track, at the point of bisection and crossing aforesaid, that the same was with great force and violence run and backed upon and against said street railway car, upon which the said appellee was then and there conductor; that, by means of said carelessness and negligence of said Madison and Indianapolis Railroad Company, the appellee was knocked off said street railway car, and carried down and under the train of said Madison and Indianapolis Railroad Company, for a distance of thirty yards, and was greatly bruised in his body, and had his right leg so broken that it became and was then and there necessary to have the same amputated.

That said injuries resulted from the aforesaid carelessness and negligence of said Madison and Indianapolis Railroad Company, and without any fault or negligence on the part of the appellee, etc.

That the railroad train did not stop before crossing the track of the street railway; that there was not upon said train any conductor or brakeman to superintend the running of the train, stop and control the same to prevent accident and injury, when the same might become necessary; and did not, on approaching or passing the point of bisection and injury aforesaid, ring any bell whatever to announce their coming, running, and passing upon said Union track.

No ordinance of the city of Indianapolis is pleaded, but it is alleged that the appellant and similar companies were prohibited by the ordinances of said city from running their trains at a greater rate of speed than — miles per hour, and the plaintiff's train was running at a greater rate than five miles per hour.

The action as to the Union Railway Company was dismissed.

The appellant answered in two paragraphs. The first was the general denial. The second was a very studied and ingeniously prepared argumentative denial, to which a demurrer was sustained.

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The cause was tried by a jury, and resulted in a verdict for the plaintiff.

A motion for a new trial was made, overruled, and judgment rendered on the verdict.

Two errors are assigned; first, the sustaining of the demurrer to the second paragraph of the answer; second, the overruling of the motion for a new trial.

There was no error in sustaining the demurrer to the second paragraph of the answer, as it amounted to no more than the denial. Every fact alleged in it was admissible, and in point of fact was admitted under the denial. It should have been stricken out on motion, but the appellant was not injured by the demurrer being sustained to it.

The refusal of the court to instruct the jury, as requested by the appellant is urged as a reason why the court should have granted a new trial. The instructions asked were as follows:

“First, if the jury believe that the bell on the defendant’s train was being rung as it approached the street railroad crossing on Virginia Avenue, and that the tracks north of the Union track, on which the defendant’s train was approaching, were filled with cars so as to obstruct the view of the Union track, and that the street car driver could not see whether there was a train approaching or not, it was the duty of the street car driver to stop the street car, and look up the track, to see whether there was or was not a train approaching; and if he neglected this, and attempted to cross the Union track, and the car was struck before it got across, this was negligence, contributing to the injury of the plaintiff, that would prevent a recovery by the plaintiff.

“Second, the rate of speed fixed by the city ordinance is not conclusive of the question of reasonable speed, as it arises between the parties in this case. For example, if it appeared here that the defendant’s cars were running at the rate of four and a half or five miles an hour, while the city ordinance prohibited a greater speed than four miles an hour; but that the accident would have happened all the same, if the cars

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had been running at only four miles per hour, the plaintiff is not entitled to recover merely because of such extra speed. You are the judges as to what is a reasonable speed under the circumstances, and it is your duty, in determining it, to be governed by the weight of the testimony offered."

We are not required to determine whether the above instructions were correct or not, for in our judgment the instructions as given by the court embraced the entire subject-matter of those asked and refused. We are clearly of the opinion that the appellant has no right to complain of the instructions of the court, for those given were certainly as favorable to the appellant as the law would justify, and if the appellee was complaining of the instructions we might be required to modify some of them.

The instructions given were as follows:

"The plaintiff brings this suit to recover damages for injuries he alleges were caused to him by reason of negligence on the part of the defendant, the railroad company, in the conduct of her train in crossing the track of the street railway company, upon one of the streets of the city of Indianapolis, which injuries, the plaintiff alleges, were received by him without any fault on his own part.

"It is necessary, to entitle the plaintiff to a verdict in this case, that he should establish by a preponderance of the evidence, not only that the injuries were received from the negligence of the defendant, but also that his own negligence did not contribute to the injury. Unless the evidence preponderates on both these points in favor of the plaintiff, then your verdict should be in favor of the defendant.

"The steam cars of the defendant and the street car upon which the plaintiff was the conductor were each engaged in a lawful business, and each was entitled to cross the track of the other. These rights were mutual. Neither was entitled to the exclusive use of the street upon which the tracks were located, but each could rightfully cross the track of the other. Although each was bound to use proper precautions for their own safety, and the safety of each other.

“In considering the question of negligence on the part of the defendant, the railroad company, you may take into consideration the length and weight of her train, the force and means employed for its control, whether the same was reasonable and proper, the place where the train was running, and its nearness to the crossing of the street and the street railway, the presence of obstructions to the view of the crossing and that part of the street near to the crossing, the condition of the track, the rate of the speed of the train, and the signals and warnings, if any were given.

“The defendant had the right to run her train at reasonable and practicable rate of speed through the city and over the crossings, and was not bound to bring it to a stop at or before the crossing. She was not bound, in the nature of her business, to ascertain that the track was clear before venturing on the crossing. The defendant, as a railroad company, had the right to use heavy and powerful machinery, to come into collision with which is dangerous to persons and vehicles drawn by horses, as usual upon streets. But she was bound to use a high degree of care and diligence in controlling her machinery and trains, and in running her trains. The defendant should have run with such prudence and such precaution against accidents as are consistent with due regard to the safety to life and property, and should give proper signals and warnings of the approach of her trains; and if the view of the street from the train was obstructed by the cars of other companies, standing, whether upon their own ground, or upon and within the line of the street, this would call for more than the ordinary diligence and care in approaching the crossing, to guard against accident.

“If, in investigating this case, and governed by these principles of law, as applicable to it, you find that the servants of the defendant did not exercise the care, diligence, prudence, and proper precaution in approaching the crossing, as was necessary, and were therefore guilty of negligence, then you should further inquire whether the plaintiff was in fault,

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or was guilty of any negligence contributing to the happening of the injury.

“If the plaintiff was the conductor of the street car, and was upon the street car at the time of the collision, and the driver of the street car was in fault, and by his neglect contributed to the happening of the injury, any such neglect was, in law, the neglect of the plaintiff, and the plaintiff is chargeable with it, and it would be sufficient to defeat this action, and entitle the defendant to a verdict.

“In considering this question of the contributory negligence of the plaintiff or of the driver of the street car, you may take into consideration the obstructions which may have been in the way of a view toward the point from which the defendant's train was approaching, making more care on the part of the plaintiff, or the driver, necessary than would have been required if the view had been unobstructed. You may also take into consideration the state of the track which the street car was to cross, if it would render the stopping of a train more than commonly difficult; if this fact was known to the plaintiff or his driver; the frequent passage of trains at such crossing; the sudden rise of grade of the street railroad track just beyond the crossing. All these facts, so far as they are shown in evidence, should be taken into consideration in determining this point.

“The driver of a street railway car is bound to use all the care and prudence in approaching a railroad crossing that a person in charge of any other vehicle moved by power as easily controlled as mules or horses is bound to use, and ordinary prudence should prompt a person to observe the track which he is to cross, on each side, to see if any train is in dangerous proximity. It was the duty of the driver and conductor of the street car, to approach the crossing with care and caution, so as to avoid collision with the steam cars upon the railroad; and if the view to the east along the Union track was obstructed by cars of other railroad companies, standing upon other tracks, whether within or without the line of the street, then this would call for especial

care and prudence on the part of the plaintiff and his driver, in approaching the crossing; and unless he was misled by the actual absence of the usual and proper signals or warnings, it would be his duty to ascertain, in some way, that the track was clear. If about the crossing there was a confusion of the ringing of the bells upon other locomotives, so that the plaintiff or his driver could not reasonably tell that the train was approaching the crossing, this would make a careful scrutiny of the track necessary, to absolve the plaintiff from the charge of negligence.

“If you find, from the evidence, that the driver of the street car, exercising ordinary prudence, might have seen the approaching train sooner than he did, and in time to have stopped his car before coming upon the railroad track, by looking in the direction of the approaching train, but that not exercising ordinary prudence he neglected to do so in time to avoid the collision, this would be such negligence on the part of the plaintiff as would deprive him of the right to recover.

“If the defendant’s train was moving at reasonable speed, and giving sufficient signal as it approached the crossing, and if the plaintiff’s street car was run upon the crossing incautiously, without proper attention to the signals, or without proper observation of the track to see whether or not the crossing would be safe, the plaintiff cannot relieve himself from the consequences of his want of caution by the fact that extraordinary precautions on the defendant’s part might have protected him from the result of his own imprudence or carelessness.

“If, then, the jury believe, from the evidence, that the plaintiff was injured by a collision between the freight train of the defendant and a street railway car, upon which the plaintiff was acting as conductor at the time, and that he was not in fault, either in his own person or in the person of the driver of the street car, whose fault or negligence, if any, is the plaintiff’s, as I have charged; and if the jury further believe, from the evidence, that the driver of the

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street car was in his proper place, and managed his team and conducted the driving of the car with the reasonable skill and prudence necessary in crossing the railroad track where the collision occurred; and if the jury further believe, from the evidence, that such collision was caused by the carelessness or negligence of the defendant's servants having control of the train, and not contributed to by the negligence of the plaintiff, or the plaintiff's driver, then the plaintiff will be entitled to a verdict.

"If the jury believe, from the evidence, that if, by the exercise of reasonable care and prudence, the plaintiff or his driver only discovered the danger when too late, in the exercise of ordinary self-possession, to save himself, then you may take into consideration the natural instincts of self-preservation in ascertaining whether the plaintiff or his driver was guilty of negligence."

Taking into consideration the instructions given, we are clearly of the opinion that there was no error in refusing those asked by the appellant.

The learned counsel for the appellant have maintained, with great earnestness and marked ability, that the verdict of the jury was not sustained by, but was contrary to, the evidence in the cause, in this, that it shows that the injury was caused by the fault and negligence of the plaintiff.

The evidence covers over seventy pages of the record. We cannot condense it into a reasonable space. We have read and considered it all. It is conflicting upon nearly every material point in the case. Evidence was offered to impeach some of the witnesses. The case, in a very special manner, depended upon the weight and consideration that should be given to the testimony. Can this court, in such a condition of the evidence, reverse the judgment on the weight of evidence? We have, for the convenience of the profession, collected together a few of the many expressions of this court on this subject.

In the case of *Rapp v. Grayson*, 2 Blackf. 130, the court say: "If the evidence, relative to the merits of the action, be

contradictory, and the jury have any grounds for their verdict in favor of the plaintiff, a court of errors will not reverse a judgment on the verdict, because a new trial had been refused."

Again, in *Lambert v. Sandford*, 2 Blackf. 137, as to the material question in the case, the court say: "The jury to whom the question was submitted, after hearing a variety of testimony, have determined it in favor of the plaintiff below, and the court in which it was tried has refused to disturb the verdict. Considering the point, as we do, a doubtful one, it becomes us, as an appellate court, to let it rest where it is."

Again, in *Hoagland v. Moore*, 2 Blackf. 167, the court say: "When there is legal evidence that conduces to prove every material fact in the case, we must, except in extreme cases, leave the weight of that testimony with the jury, under the superintendence and control of the court before which the testimony is given; and when that court approves of the verdict, and refuses a new trial, there is no principle of jurisprudence that will require or permit an appellate court to reverse the judgment."

Again, in the case of *Lurton v. Carson*, 2 Blackf. 464, the court say: "The testimony presented is contradictory. Exclusive of the defect in the bill of exceptions, we should be unwilling to interfere with this verdict. The verdict of a jury is entitled to great respect. It is their province, in such a case as this, to weigh the testimony. It is with reluctance that a court would interfere. If there be ground for an honest difference of opinion, the verdict should not be set aside."

Again, in the case of *Mann v. Clifton*, 3 Blackf. 304, the court say: "It is at best a very delicate matter for an appellate court, not having heard the witnesses examined, to disturb the opinion of the jury and of the inferior court, relative to the weight of the testimony. To justify us in interfering in such a case, the insufficiency of the evidence must be shown beyond all doubt."

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Again, in *Rogers v. Bishop*, 5 Blackf. 108, the court say: "This judgment was rendered upon the merits without a jury, and must therefore be viewed in the same light as if there had been a verdict for the defendant, a motion for a new trial founded on the insufficiency of the evidence overruled, and a judgment on the verdict. The judgment, in such case, must be obviously wrong to justify our interference."

Again, in the case of *Kendall v. Hall*, 6 Blackf. 507, the court say: "The judgment of the circuit court will not be reversed on the weight of evidence, if the evidence be contradictory."

Again, in the case of *Calkins v. Evans*, 5 Ind. 441, the court say: "When the court, either by operation of law or by the agreement of parties, has been substituted for a jury, its conclusions are entitled to the same consideration and respect (as the verdict of the jury). Such finding is not to be lightly set aside. It must remain as the measure of the rights of parties, unless it is clearly wrong."

Again, in the case of *McVicker v. Pratt*, 5 Ind. 450, the court say: "The court trying the cause, with the witnesses before it, is far better prepared to discriminate than we are; and litigants need not expect this court to reverse the judgments of other courts upon the weight of evidence, where there is sufficient in the record to sustain the judgment below."

Again, in the case of *Shanks v. Hayes*, 6 Ind. 59, the court say: "There is sufficient evidence in the record, in favor of the plaintiff below, taken by itself, to justify the judgment. There is also, in addition, conflicting evidence. It was all for the jury; and no rule is better settled than this, that in such case the Supreme Court cannot disturb the action of the court below in rendering judgment on the verdict of the jury."

Again, in the case of *Millhollin v. Jones*, 7 Ind. 715, the court say: "The verdict is complained of as contrary to the evidence. The evidence is conflicting; hence, we cannot disturb it."

Again, in the case of *Cahill v. Vanlaningham*, 7 Ind. 540,

the court, after holding that the law had been correctly given to the jury, and the court below having acquiesced in the finding of the jury by overruling a motion for a new trial, say: "We should be reluctant to disturb the verdict. Such has always been the rule in this court, whenever they could not clearly say there was no evidence to support the verdict."

Again, in the case of *Roberts v. Nodwift*, 8 Ind. 339, the court say: . "The first of the causes assigned for a new trial is rather unpromising, and by no means a favorite with the courts. It is this: the verdict is contrary to law and evidence, and is not for enough money. Courts will seldom disturb a verdict for such a cause, unless the case is a very strong one; and this is not one of that class."

Again, in the case of *Favorite v. Bush*, 9 Ind. 228, the court say: "Even if the record were full, and the questions fairly presented, it would hardly avail the party here. For the inquiry which the issue below presented, was peculiarly within the province of that court to decide; and unless the finding was extravagant, the rule of this court has invariably been, to give it the same weight as the verdict of a jury."

Again, in the case of *Gibson v. The State*, 9 Ind. 264, the court say: "Still we think the preponderance is in favor of the verdict; and even if the preponderance were otherwise, it has long been the settled rule of this court not to disturb it."

Weinzorpflin v. The State, 7 Blackf. 186; *Ledley v. The State*, 4 Ind. 580.

Again, in the case of *O'Herrin v. The State*, 14 Ind. 420, the court, after holding that the rule of practice was the same in criminal as in civil cases, upon the question of setting aside verdicts on the ground that the evidence was insufficient, then say: "This court will not reverse the ruling of the court below, refusing to grant a new trial moved for on the ground that the verdict was unsustained by the evidence, unless the verdict appears most clearly erroneous."

Again, in the case of *Hollingsworth v. Pickering*, 24 Ind. 435, the court say: "The evidence is in the record. It is

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very conflicting in regard to the alleged representations as to the locality and quality of the land sold by Hollingsworth to Pickering, in Iowa; but the evidence of Pickering, if taken as true, fully sustains the complaint on those points. It is directly contradicted by the testimony of Hollingsworth. It was, therefore, a question of credibility between the witnesses, which it was the exclusive province of the jury to determine, and we cannot examine it for the purpose of disturbing the verdict."

Again, in the case of *Shank v. The State*, 25 Ind. 207, the court say: "Did the evidence sustain the verdict? This question is argued before us as if we could reverse the case upon the ground that a mere preponderance of the evidence is against the verdict. It has been otherwise ruled so many scores of times by this court, and so many hundreds of times by appellate courts elsewhere, that we know not what more can be added to make the rule better understood."

Again, in the case of *Medler v. The State*, 26 Ind. 171, the court say: "The only question in this record is as to the sufficiency of the evidence to support the verdict. It was a bastardy case, and seeing the evidence upon paper, with no such opportunity as the judge and jury below had of determining upon the credibility of witnesses, it appears quite probable that the verdict should have been the other way. But this is not enough to justify us in reversing the case. To one who saw the witnesses and heard them testify, there may have appeared good reason for disbelieving some of them. The evidence was contradictory, and we must therefore assume that the judge who presided and overruled a motion for a new trial acted intelligently and upon sufficient cause."

Again, in the case of *The Indianapolis, Cincinnati, and Lafayette Railroad Co. v. Trisler*, 30 Ind. 243, the court say: "The appellant argues the case as if this court were to weigh the evidence and determine the preponderance thereof. Such is not our province. It must appear by the record,

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not merely that the finding below was against the weight of evidence, but that that finding was wrong beyond any question whatever, before we can interfere upon the evidence alone."

Again, in the case of *McCaw v. Burk*, 31 Ind. 56, this court say: "There is a clear conflict in the evidence as to whether the deeds under which the appellees claim title were executed as a mortgage. This court would not reverse a judgment on the weight of the evidence."

Again, in the case of *Keneaster v. Vickers*, 32 Ind. 492, this court say: "This case is before us upon the evidence, which was very conflicting, the finding upon the issues depending much upon the credit due to the witnesses. It is, therefore, peculiarly a case in which this court cannot disturb the finding."

Again, in the case of *Smith v. Kruger*, 33 Ind. 86, this court say: "We have examined the evidence, which is in the record. The case was tried by the judge of the court below, who heard all the evidence from the witnesses themselves. It is not our province to interfere with his finding, unless it is clearly against the evidence, and can be considered only as the result of passion, prejudice, or a palpable misapprehension of the facts."

Again, in the case of *Butt v. The Toledo, Wabash, and Western Railway*, 34 Ind. 162, this court say: "The only question before us in this record is the correctness of the finding of the court below on the evidence, all of which is in the record. The evidence was all oral and unwritten, and is conflicting and contradictory; and the judge who tried the case was better able to determine its strength, weight, and the reliability of witnesses than we are; and therefore we cannot reverse, but must affirm the judgment."

Thus it will be seen that there has been an uniform and unbroken line of decisions on this subject from 2 Blackf. down to and including 34 Ind. The rule is not an arbitrary one, but is founded in reason, and supported by the experience of lawyers and judges. It exists not only in this court,

but in all appellate courts acting as courts of error. The reason of the rule is, that the weight which is due to the testimony of witnesses very greatly depends upon the appearance, manner, and conduct of the witnesses upon the witness stand, their intelligence, their willingness or unwillingness to testify fully and frankly upon all matters within their knowledge, without reference to whether it affects the one party or the other, and whether they are free from passion, prejudice, or undue influence. It is a very easy matter to tell the truth, but it is a very difficult matter to testify falsely and not be detected. The witness that has nothing to testify about but what he knows, is open, frank, and undisturbed in his manner, while there is an indefinable and indescribable manner and look about a witness who is swearing falsely. The judge, counsel, and jurors have the opportunity of observing all these matters, and, as a general rule, can determine, with great accuracy, whether the witness is telling the truth or a falsehood. When the evidence comes here on paper, we have nothing but the words of the witness, and they are not always correctly taken down. With us, the testimony of an untruthful and unreliable witness, who is unimpeached, has as much weight as the testimony of the best and most reliable man in the community, for we have no means of telling the one from the other. We are deprived of all the means of detecting falsehood and discovering the truth enjoyed by the judge and jury in the court below. Great and manifest injustice would be done if we should attempt to weigh the evidence and determine the credibility of witnesses. The reason of the rule does not apply to the circuit and common pleas judges; for they have the same means and opportunity of observing the witnesses, and determining the weight that is due their testimony, as are enjoyed by the jury. The rule of this court was founded, and has been adhered to, upon the supposition that the judges of the lower courts have faithfully and fearlessly discharged their duties in refusing or granting new trials, as the justice of each case may require. If we

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should ever have reason to believe that the judges below apply the same rule in granting, or refusing to grant, a new trial that we do to reversing a case upon the weight of evidence, then we will have to change our rule; for great and glaring injustice would result if both courts were governed by the same rule. The rule does not apply in this court when the case was tried on documentary evidence; for in such case we have the same means of examining and weighing the evidence as the judge or jury in the court below.

We cannot reverse the case upon the weight of the evidence.

The judgment is affirmed, with costs.

ON PETITION FOR A REHEARING.

BUSKIRK, J.—A rehearing has been asked in this case, upon the ground that in the original opinion we had not fully considered and decided whether the court erred in admitting in evidence the ordinance of the city of Indianapolis regulating the speed of cars within the city. The question was presented in two modes; first, in the exception to the ruling of the court admitting such evidence; and, second, in the refusal of the court to give to the jury the second instruction asked by the appellant. We considered and decided the question as it arose upon the refusal to give the second instruction. We are now asked to grant a rehearing because we did not, in express terms, decide whether the evidence was admissible. Two objections are urged to the competency of the evidence, first, that it was not properly pleaded; and, second, that it was irrelevant. We think that neither objection is well taken. It was alleged in the complaint that, by an ordinance of the city, it was unlawful for trains of cars to run within the city at a greater rate of speed than four miles per hour, and that the train of cars which inflicted the injury upon the plaintiff was running at a greater rate of speed than four miles per hour.

The action was not based upon the ordinance, as was the case of *Green v. The City of Indianapolis*, 25 Ind. 490, and

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hence it was not necessary to file a copy of the ordinance with the complaint.

We are also of the opinion that the evidence was competent. It was, under the allegations of the complaint, admissible to prove that the defendant was guilty of negligence, and it was also clearly proper for the jury to consider in determining whether the plaintiff was without fault, which was the principal controverted point in the case. The rate of speed within the city being prescribed by a public law, the plaintiff, in determining whether it was safe and prudent for him to attempt to cross the railroad track, had the right to assume that the defendant would comply with such ordinance. It might have been safe for the plaintiff to have attempted to cross the track of defendant's road if the cars only ran at the rate of four miles an hour, while it would have been unsafe and reckless to have made such attempt if the cars were being run at a much greater rate of speed.

We are very clearly of the opinion that the court committed no error in admitting the ordinance in evidence, and in refusing to instruct as requested. We have, upon the petition for rehearing, again fully considered all the questions in the case, and are entirely satisfied with the judgment heretofore rendered.

The petition is overruled.

T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for appellant.

J. W. Gordon, J. R. Troxell, J. Hanna, and F. Knefler, for appellee.

McKERNAN v. COLLINS.

CONTRACT.—*Interpretation.*—A contract that if certain improvements are sold for five thousand dollars, B. is to have four hundred dollars, or in proportion if

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for a less sum; and if the works and machinery constituting the improvements are started again and are successful, A. is to have the same amount, but if unsuccessful, nothing, will entitle A. to a proportion, if the improvements are sold after an unsuccessful attempt to run them.

APPEAL from the Marion Circuit Court.

DOWNEY, J.—On the 1st day of August, 1867, the parties entered into a co-partnership in the Carondelet furnace property, Collins taking one-fourth and McKernan retaining three-fourths, Collins receiving one-fourth interest in consideration of his assuming the one-fourth of the expenses incurred in putting up the said furnace by McKernan, and from that date he was to take a full one-fourth interest in the furnace, sharing to that extent with said McKernan in all its assets and debts, in accordance with the laws and bond of purchase between said McKernan and the Pilot Knob Iron Company, Collins to enjoy the advantage of any reduction in the price of the property made by the Pilot Knob Company. On the 11th day of September, 1867, this co-partnership was terminated by the following agreement:

“INDIANAPOLIS, September 11th, 1867.

“This is to certify that if James H. McKernan makes sale of the improvements of the Carondelet furnace, situated at Carondelet, Missouri, for five thousand dollars, four hundred dollars is agreed upon to be paid Mr. William Collins, or in proportion to whatever the sale amounts to under five thousand dollars; but in case the works are started again and prove a success, will still entitle him to the four hundred dollars, as agreed upon; but if not a success, Mr. William Collins receives nothing. This is in consideration out of a co-partnership existing between James H. McKernan and William Collins.

[Signed]

“WILLIAM COLLINS,

“JAMES H. MCKERNAN.”

This action was predicated upon this agreement of September 11th, 1867. The complaint is in three paragraphs. The first alleges that McKernan sold the said improvements for a sum exceeding five thousand dollars, by reason whereof

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he became liable to pay to Collins the said sum of four hundred dollars, but which he has failed to pay. The second paragraph alleges that the works of the said furnace were started again and proved a success, yielding large profits to the owners of the same; that the defendant, since September 11th, 1867, received from the city of St. Louis, as a bonus, the sum of fifteen thousand dollars. The third paragraph alleges that the said works were started again, and did prove, and have continued to prove a success, and that the defendant did sell said works for a large sum of money, to wit, the sum of nine thousand dollars.

There was a demurrer by the defendant to the first paragraph of the complaint, which was overruled, and this is assigned as error; but that paragraph is clearly sufficient. The defendant then pleaded the general denial to all the paragraphs of the complaint, and a trial by jury resulted in a verdict for the plaintiff for four hundred dollars. The defendant moved for a new trial, for the following reasons:

1st. The verdict is contrary to law.

2d. Is not sustained by the evidence, but is contrary to the evidence.

3d. The damages are excessive.

4th. Error in the assessment of the amount of recovery, the same being excessive.

This motion was overruled, and the defendant excepted, put the evidence in the record, and, judgment having been rendered against him, he appealed to this court.

The only error properly assigned, besides the one already disposed of, is, that the court improperly refused to grant a new trial.

Before proceeding to consider the case upon the evidence, it is proper to dispose of a motion which has been made by the appellant to strike out of the record the deposition of John H. Harrison. That deposition appears to have been copied into the bill of exceptions without any authority, as it does not appear to have been used on the trial. It must,

therefore, be stricken out and disregarded in considering the facts of the case.

Precisely what was meant by the word "improvements," as used in the contract sued on, is not very clear. The partnership contract between McKernan and Collins says they had formed a partnership in "the Carondelet furnace property." Collins testified, that "the improvements mentioned in the agreement were the lease, lands, buildings, and other improvements on the ground. I think there were eight buildings on the ground." It thus seems probable that the word improvements was intended to include all the property which had been owned by McKernan and Collins as partners at Carondelet.

It is shown that McKernan failed to sell the property, and in two months after the 11th of September, 1867, took into partnership with him Lilly and Miller, and again "started the works." During the existence of this partnership, they expended on the property for repairs and improvements sixteen thousand dollars, and received as contributions by way of bonus from St. Louis and Carondelet, and perhaps other parties, twelve thousand dollars, which they agreed to repay if their operations proved successful. This firm failing in success, Lilly and Miller sold their interest back to McKernan. He afterward sold the entire property for fifteen thousand dollars to Spear and McNair.

We do not see that Collins can rightfully claim anything on account of the sums obtained by McKernan, Lilly, and Miller, by way of bonus or donation. He was not then a member of the firm, but had previously sold out to McKernan.

McKernan, Lilly, and Miller, while they were in partnership, expended on the property, in improvements, sixteen thousand dollars, and these improvements were added to those which are mentioned in the contract upon which the suit is brought.

By the purchase of the interest of Lilly and Miller, McKernan became the sole owner of these improvements thus made,

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Collins having no interest whatever in them. Now, as McKernan sold the whole property for only fifteen thousand dollars, there should have been evidence showing the value of the improvements referred to in the contract sued upon or what McKernan got for them, to enable the jury to determine whether McKernan sold them for five thousand dollars, or less, and if less, how much? Without this evidence the jury could have had no proper basis on which to determine the amount to which Collins was entitled under the first provision of the contract.

It is very clear that the evidence does not show that the attempt to operate the furnace, while McKernan was connected with it was successful.

There may be some doubt whether the sale of the property after an unsuccessful effort to make the furnace "a success" by again running the "works," would entitle Collins to anything. But, after some hesitation, we have come to the conclusion that, under the very general language of the contract, which fixes no time within which the sale should be made, a sale after an unsuccessful attempt to operate the furnace will entitle him to recover what the evidence may show him entitled to recover.

The judgment is reversed, with costs, and the cause remanded.

J. T. Dye and *A. C. Harris*, for appellant.

W. Wallace, for appellee.

TEST ET AL. v. BEESON ET AL.

JUSTICE OF THE PEACE.—*Disqualified.*—*Jurisdiction.*—A judgment was obtained before a justice of the peace, and the docket of the justice legally passed into the hands of another justice, and execution issued by the latter justice was levied on property as that of the execution defendant, and proceedings were brought to try the right of property before another justice, on the ground that the one who issued the execution was related to the plaintiff, and, therefore, refused to take jurisdiction.

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Held, that where the justice of the peace who issued the execution is disqualified from acting, and has no successor, there is no jurisdiction in any other justice to act.

APPEAL from the Wayne Circuit Court.

WORDEN, C. J.—Beeson, one of the appellees, recovered a judgment against one Thomas Sivvee, before Cornelius Thornburg, a justice of the peace of Wayne county. Afterward the docket of justice Thornburg went into the legal custody of William Chamness, a justice of said county, who issued an execution upon the judgment, which was placed in the hands of Lamb, the other appellee, a constable, for service. Lamb levied the execution upon certain property as the property of Sivvee. The appellants, Test and Test, claiming the ownership of the property, instituted this proceeding for the trial of the right thereof, under the provisions of the statute on that subject (2 G. & H. 632), before John Davis, another justice of said county. The reason assigned for instituting the proceeding before justice Davis, instead of justice Chamness, who issued the execution, was that Chamness was a relative of Beeson, viz., a cousin within the prohibited degree, and that he refused to entertain jurisdiction of the cause. Such proceedings were had before justice Davis as led to an appeal to the circuit court, where the cause was dismissed for want of jurisdiction in justice Davis. The appellants excepted, and bring the cause to this court for revision.

The first section of the statute above cited provides, “that whenever any personal property shall have been seized by virtue of any writ of execution or attachment, and any person, other than the defendant in such writ, shall file with the justice who issued such writ, or if the same be levied upon by more than one writ, with the justice who issued the oldest writ so levied, his complaint in writing, verified by affidavit, setting forth the fact of such levy, or seizure, and stating his claim to said property, and the nature of such claim, whether absolute or conditional, such justice shall docket such complaint for trial; and the same shall be tried and determined, and continuances granted, and changes of

Test et al. v. Beeson et al.

venue awarded, and all other proceedings had thereon as in other civil complaints before justices."

By this provision it will be seen that the complaint for such purpose is to be filed with the justice who issued the writ on which the levy is made, or if made on more than one writ, then with the justice who issued the oldest writ.

Perhaps the reason of requiring the complaint to be filed with the justice who issued the writ was, that the plaintiff in the writ, and especially the officer who has it to serve, who is required to be made a party to the proceeding, should not be required to go to a forum where the writ was neither issued nor returnable, to defend such proceeding. There seems to us to be much propriety in confining the jurisdiction in such cases to the court in which the writ issues and is returnable. Perhaps the successor of a justice who had issued the writ, but who had gone out of office before any question arose, and where the writ would be returnable to such successor, would be deemed the justice who issued the writ, within the spirit of this statute. On this point, however, we intimate no opinion.

This statute is a separate act and not connected with the general statute regulating the powers and duties of justices of the peace. The jurisdiction of justices as to amount, under this act, is not limited by the general statute. *Griffin v. Malony*, 13 Ind. 402.

By the general statute a justice has no jurisdiction where he is "related by blood or marriage to either party." 2 G. & H. 579.

The question here, however, is not whether justice Chamness, who issued the writ, was disqualified to act in the cause, but whether justice Davis had jurisdiction. We decide nothing as to the disqualification of justice Chamness to act in this special proceeding; but conceding that he was disqualified, it does not follow that another justice of the peace could, therefore, step into his shoes and exercise the jurisdiction thus specially conferred upon the justice who issued the writ.

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We are not aware of any statute authorizing another justice to act where the justice who issued the writ is disqualified, or dead, or otherwise rendered unable to exercise the jurisdiction thus conferred.

If we hold that justice Davis had jurisdiction of this cause, we must do it on the broad ground that where jurisdiction is conferred on one tribunal only, and that tribunal is disqualified to exercise the jurisdiction in a particular instance, another tribunal may step in and exercise the jurisdiction in that instance. There is no authority for such doctrine.

If justice Chamness was incompetent to act in the premises, then there was no forum provided in which the appellants could enforce this particular remedy. This, however, was no great hardship, as they had ample remedies outside of the provisions of the statute in question.

We concur with the court below in the opinion that justice Davis had no jurisdiction of the cause.

The judgment below is affirmed, with costs.

J. P. Siddall and *C. H. Burchenal*, for appellants.

W. S. Ballenger, for appellees.

WALLACE v. THE BOARD OF COMMISSIONERS OF MARION COUNTY.

STATUTE.—*Constitutionality.*—*Fees and Salaries.*—The act known as the “Fee and Salary Law,” Acts 1871, p. 25, is not, as an entire act, invalid.

SAME.—*Payment of Fees into County Treasury.*—The members of the court were equally divided in opinion as to the constitutionality of that portion of the law which requires the clerk and sheriff to pay over their fees to the county treasurer.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—The appellant filed his complaint in the common pleas against the appellee, alleging, in substance, that he was clerk of the Marion Circuit Court, and as such, since

37	383
137	561
137	581
37	383
145	593
147	200

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the taking effect of the act of the General Assembly of this State of Indiana, entitled "An act regulating the fees, salaries, and duties of certain officers therein named, and prescribing penalties for the violation of its provisions," approved February 21st, 1871, Acts of 1871 p. 25, he had collected fees and charges pertaining to his said office in the sum of one hundred dollars; that the defendant had demanded and required of him that he should pay the same into the county treasury, and threatened that if he did not do so the defendant would cause him to be prosecuted for embezzlement; that to avoid said prosecution, protesting at the same time against the legality of the demand, he had paid the same, under an agreement that it should not be regarded as a voluntary payment; that he afterward demanded the repayment of the money, which was refused.

The defendant voluntarily appeared to the action and demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the court, the plaintiff excepted, and, after final judgment for the defendant, appealed to this court. He here assigns for error the sustaining of the demurrer to the complaint.

At the last term of this court, the judges were equally divided with reference to the opinion which they should give in the case, and being still equally divided in opinion, each of them is required to give "his written opinion of each point in the case arising upon the record." The case is one, as will be seen, which involves the validity of part or of the whole of the act, the title to which is above recited, and which is commonly known as the "Fee and Salary Law."

We all agree that none of the objections urged against the law, as a whole, can be sustained; that the entire act is not invalid on account of any objection urged against it.

The questions arising in the case grow out of the following sections of the act:

"Sec. 19. The clerk shall tax and keep an accurate ac-

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count, in proper fee-books, of all fees and charges, as required by this act, or other laws of the State, for any and all services performed by himself or his deputy, or performed by the sheriff or his deputies, and returned to him. And it shall be the further duty of the clerk to make an index to the several records, order books, and dockets of his office, plainly referring to the entries therein for which he may charge in each cause, and all the entries, orders, and proceedings pertaining thereto upon all the records, order books, and dockets, a single fee not exceeding twenty-five cents. And it shall be the further duty of such clerk to keep a cash book, in which he shall enter, consecutively and as received, each sum of money by him received, with the date of such receipt, with a brief mention of the cause or matter in which it was received, which book so kept shall remain at all times at his office for inspection.

“Sec. 20. The clerk and sheriff of each county shall, on the first Mondays in December, March, June, and October in each year, pay over to the county treasurer all moneys received by them for fees or charges for official services during the preceding three months, taking the treasurer's receipt therefor, which receipt shall designate the character of the payments, the time for which it was paid; and such receipt they shall file with the auditor of the county, who shall register the same, and execute therefor a quietus to them, and the sums so paid by such clerk and sheriff to the treasurer shall be by him and the auditor kept as a distinct fund, to be known as county officers' fund: *Provided*, If there shall be a surplus of the same at the end of any year, after paying the salaries herein provided for, the board of commissioners may transfer the same to and merge the same in the county revenue fund. And the said clerk and sheriff shall also, on the first Mondays of December, March, June, and October, in each year, pay to the treasurer all fines, forfeitures, docket fees, jury fees, unclaimed witness fees, and all other moneys belonging to the school fund, take his re-

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ceipt therefor, file the same with the auditor, and take his quietus for the same; and upon failure of said clerk and sheriff so to do, the party so offending shall be fined in any sum not less than five dollars.

"Sec. 24. The clerk of the circuit court and sheriff in each county in this State shall receive the sum of fifteen hundred dollars annually for their services in discharging the duties of clerk of the circuit court and common pleas courts and sheriff of the county, and all other duties pertaining to their office, and no more, except as hereinafter provided in this act.

"Sec. 25. There shall be allowed to each clerk of the circuit court of each county and sheriff, for the pay of deputies, when the population of the county exceeds ten thousand, the sum of one hundred dollars for each one thousand inhabitants, or fraction thereof over five hundred, over ten thousand in each county. Said clerks and sheriffs shall, in addition to the above, be allowed a commission of twenty per cent. of all his own costs by him taxed, and which may be collected and paid to the treasurer, as in this act provided; and in counties where criminal or superior courts shall be established such clerk and sheriff shall each be entitled to the further sum of nine hundred dollars per annum for deputies in each of such courts, to be allowed and paid to them as their other salaries are paid."

The first position assumed by the appellant is that it is an unauthorized tax on the administration of justice, to require the clerk and sheriff to pay over to the treasurer the fees charged by them to constitute a "county officers' fund," out of which their salaries and hire of deputies are to be paid, for the reason that the surplus, if any, may be by the commissioners ordered to be paid into the "county revenue fund." It is not contended that fees may not be charged to litigants, for the services rendered by the clerk and sheriff; but it is insisted that all the money so charged and collected must remain in the hands of such officers, as has been the case under former fee laws; and that the possibility that in

some counties there may be a surplus, after paying such salaries and deputy hire, which may find its way into the common treasury, renders the nineteenth and twentieth sections of the act invalid, on account of their repugnancy to the constitution of the State. Had the legislature made the tariff of fees just as it did in this act, and allowed all the fees collected to remain in the hands of the officers, it seems not to be contended that it would have been unduly taxing litigation or litigants, or the administration of justice. But because the legislature could not arrange the tariff of fees so as to produce exactly the sum allowed for salary and deputy hire, and provided that any such surplus, if any there should be, should go into the common fund, it is claimed that this renders this part of the act unconstitutional and void. I think otherwise. If litigation were made to pay its own expenses, this possible surplus would be but as a drop in the bucket compared with the amount paid out of the common treasury for its support. How can it be known that there will be in Marion county any surplus after paying the salaries and deputy hire allowed by law? If there shall not be, then there is no tax on litigants, or on the administration of justice, beyond a sum sufficient to pay the clerk and sheriff, leaving all other expenses of the courts to be defrayed out of the common fund.

But it is further contended by the appellant that sections 24 and 25, which fix the salary of the clerk and sheriff and the amount for deputy hire, are unconstitutional and invalid. Exactly what objection is urged to section 24, I do not know. Section 25 is condemned on account of its manner of graduating the amount allowed for deputy hire. I believe it is contended that the salary and pay of deputies must be of uniform amount throughout the State; that a clerk or a sheriff in a small county must, for the sake of uniformity, have as much as a clerk or sheriff of a large county for salary and hire of deputies. It is not contended that the clerk and sheriff may not be paid by a salary, but it is claimed that the constitution of the State is violated by the manner of

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graduating the pay according to population. I have not been able to see any valid objection to these sections.

I think the judgment should be affirmed.

BUSKIRK, J.—I concur in the views expressed by my brother, DOWNEY.

WORDEN, C. J.—I am of opinion that the complaint in this cause was good, and that the demurrer thereto should have been overruled; and, therefore, that the judgment should be reversed.

I think that the act regulating fees and salaries, etc., approved February 21st, 1871 (Acts 1871, p. 25), may be upheld so far as it fixes the fees of clerks and sheriffs. But I am of opinion that so much of the act as requires those officers to pay over to the county treasurer the fees, or any part thereof, received by them respectively for services by them performed as officers of courts of justice, is in conflict with section 12 of the first article of the constitution of the State. Under that provision of the constitution, justice is to be administered "freely, and without purchase." And while it may be that litigants can be required to pay docket fees, or otherwise contribute to the support of the judiciary in such manner as might be provided for by law, it is clear to my mind that they cannot be required, through the medium of clerks and sheriffs, nominally as for their fees, to put money into the county treasury which may be used for general purposes, and as the condition upon which justice can be administered to the litigating parties by the courts of the State.

PERRIT, J.—I fully concur in the opinion of the Chief Justice, above expressed; but I add another reason why the law is unconstitutional, so far as it attempts to make a salary for the clerk and sheriff, which must necessarily be local or special, as it violates section 22 of article 4 of the state constitution, which forbids the passage of local or special laws, etc., "in relation to fees or salaries." The clerks and sheriffs,

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under this law, would have different salaries in different counties, when a general law could be passed to make them equal and general, and its provisions violate the 23d section of the article above referred to, which is:

“Sec. 23. In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State.”

N. B. Taylor, E. Taylor, T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for appellant.

L. Barbour, C. P. Jacobs, and C. W. Smith, for appellee.

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37	389
141	504

RECORD.—*Report of Master.*—*Bill of Exceptions.*—A report of a master is no part of the record unless made so by bill of exceptions.

APPEAL from the Floyd Circuit Court.

PETTIT, J.—In this case there is no question raised on the pleadings, nor is there any error assigned for any ruling on them. There was no motion for a new trial in the court below, nor is the overruling of such motion assigned for error here. The only questions raised are as to the report of a master. That report is no part of the record, unless made so by bill of exceptions, which is not done; and we cannot, therefore, take any notice of its imperfections, it being used as mere evidence on which the court finds and renders its judgment. 2 G. & H. 273, sec. 559. No motion having been made for a new trial in the court below, no evidence is, or can be, properly in the record, and we cannot, therefore, say that the court erred in its judgment.

The following cases, with many others that might be cited in our own reports, fully sustain us in this ruling. *Doe v.*

Geisel v. Taylor et al.

Herr, 8 Ind. 23; *The State v. Swarts*, 9 Ind. 221; *Thompson v. Shaefer*, 9 Ind. 500; *Gray v. Stiver*, 24 Ind. 174.

The judgment is affirmed, at the costs of the appellants.*
G. V. Howk, *J. H. Stotsenburg*, *T. M. Brown*, and *W. W. Tully*, for appellants.

D. C. Anthony and *W. March*, for appellee.

*Petition for a rehearing overruled.

GEISEL v. TAYLOR ET AL.

COUNTY CLERK.—*Fees and Salaries*.—The clerk is entitled to tax and collect fees “for indexing,” “for jury fees,” and “for docket fees,” under the fee and salary act of February 21st, 1871.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—This case is supposed to involve the constitutionality of the act of February 21st, 1871, known as the fee and salary law, or some portions of it. It was a motion to correct the taxation of costs. The clerk had charged in the bill of costs these items: “For indexing, twenty-five cents,” under and by virtue of the provisions of the nineteenth section; “for jury fee, five dollars,” and “for docket fee, two dollars,” under and in pursuance of the sixteenth section of the act. The appellant sought to have these items stricken out of the list of fees. The court¹ overruled his motion. He excepted and appealed. We think the court committed no error. There is no difference of opinion among the members of this court as to the right to tax and collect the costs.

The judgment is affirmed, with costs.

A. T. Beck and *H. Cole*, for appellant.

J. S. Duncan, *H. W. Harrington*, and *C. A. Korbly*, for appellees.

37	391
134	662
135	181
136	662

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87	301
140	426
142	224

CHANDLER, by MOORE, Guardian, v. CHENEY.

HUSBAND AND WIFE.—*Conveyance.*—*Estates by Entireties.*—A husband and wife, though not thus described in a deed of conveyance of real estate executed to them, take under such deed as tenants by entireties.

SAME.—*Tenants by Entireties and Joint Tenants.*—*Distinction.*—The same difference which existed at common law between joint tenants and tenants by entireties continues under our statute. In both the title and estate are joint, and both have the quality of survivorship; but the marked difference between the two is this: in a joint tenancy, either tenant may convey his share to a co-tenant, or to a stranger, who thereby becomes tenant in common with the other co-tenant; while neither tenant by the entirety can convey his or her interest so as to affect their joint use of the property during their joint lives, or to defeat the right of survivorship upon the death of either of the co-tenants. There may also be partitions between joint tenants, but not between tenants by entireties.

SAME.—*Execution.*—*Fraud.*—While such an estate exists, no interest in it can be sold on execution for the debts of the husband or wife, but the conveyance creating it may be set aside for fraud.

SAME.—*Essentials.*—From the nature of the estate and the legal relation of the parties, there must be unity of estate, unity of possession, unity of control, and unity in conveying or incumbering it.

SAME.—*Mortgage by Husband.*—A mortgage upon such an estate executed by the husband alone is void.

APPEAL from the Shelby Circuit Court.

BUSKIRK, J.—This was a proceeding to perpetually enjoin the sale of certain real estate, under and by virtue of a decree of the foreclosure of a mortgage. The complaint alleges, in substance, that Stephen Guile and wife, on the 3d day of September, 1866, conveyed, by general warranty, a certain house and lot in Shelbyville, Indiana, to Eldridge G. Mayhew and Sarah Mayhew; that at the time of the said conveyance, the said Mayhew and Mayhew were husband and wife; that on the 20th day of February, 1867, the said Eldridge G. Mayhew, by his separate deed, mortgaged the said lot to the defendant, Whitfield Chandler, to secure the payment of a note for three hundred and thirty dollars, dated on the 4th day of April, 1865, which mortgage was on the same day recorded in the office of the recorder of said county; that on the 13th day of May, 1867, the said Eld-

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ridge G. Mayhew and Sarah Mayhew, his wife, by a general warranty deed, conveyed the said lot to one Elijah Hopper, Sen., for the sum of seven hundred and fifty dollars; that by several successive conveyances, the plaintiff became the owner of the said property, under and through the deed from Mayhew and wife, made subsequent to the execution of the mortgage by Mayhew to Chandler; that at the October term, 1867, of the Shelby Circuit Court, the said Chandler obtained a decree of the said court, foreclosing the said mortgage, and decreeing the sale of the said property; that the said Chandler had caused to be issued by the clerk of the said court a copy of the said decree, and was proceeding, through the sheriff of said county, to sell the said property, under and by virtue of the said decree, and would do so unless enjoined from so doing; and that the said mortgage executed by the said Mayhew to the said Chandler was illegal and void, for the reason that the said Mayhew and his wife held the said property as tenants by entireties, and that a mortgage or deed executed by one joint tenant by entirety was void.

The prayer of the complaint was for a perpetual injunction enjoining the sale of the said property under the said decree of foreclosure, to quiet the title of the plaintiff thereto, and to remove any cloud that had been cast upon the title of the plaintiff by the existence of the said mortgage and decree of foreclosure.

The appellant demurred to the complaint, upon the ground that it did not contain facts sufficient to constitute a cause of action. The demurrer was overruled, and the appellant excepted.

The appellant then answered in two paragraphs. The first was a denial, and the second in avoidance; but as no point is made upon the answer, we do not deem it necessary to set out the second paragraph thereof.

The appellee replied by a denial of the allegations contained in the second paragraph of the answer. The cause was, by the agreement of the parties, submitted to the court

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for trial, which resulted in a finding for the plaintiff. A motion for a new trial was made and overruled, and an exception was taken.

The court rendered a decree perpetually enjoining the sale of the said property for the payment of the said decree of foreclosure; that the said judgment of foreclosure as to the said lot should be held of no force or validity; that the title of the said plaintiff in and to the said lot should be quieted; and that any cloud that rested on the title of the plaintiff by reason of the said mortgage and judgment of foreclosure be, and the same was, thereby removed.

The appellant has assigned two errors; first, that the court erred in overruling the demurrer to the complaint; and, second, in refusing a new trial.

The great and leading question in the case is, whether Eldridge G. Mayhew had, at the time he made the mortgage to Chandler, a mortgageable interest in the property in dispute, which he could mortgage by his separate deed. The solution of this question depends upon the nature and character of the estate which was vested in Eldridge G. Mayhew and Sarah Mayhew, by the deed from Guile and wife. If they held the property as tenants in common, there can be no doubt as to the validity of the mortgage so far as it affected the interest of Eldridge G. Mayhew, the mortgagor. If they held the property as tenants by entireties, then the mortgage will be void, unless the husband has the right to incumber by his separate deed property held by him and his wife as tenants by entireties.

It is maintained by the appellant that Eldridge G. Mayhew and Sarah Mayhew were not seized of the said property as tenants by entireties, for the reason that they are not described as husband and wife in the deed to them, from Guile and wife.

It is maintained by the appellee that the character of the estate does not depend upon the manner in which the grantees are described in the deed, but upon the fact that they were husband and wife at the time the deed was made.

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It is also maintained by the appellant that, conceding that Mayhew and his wife were seized as joint tenants by entireties the husband can convey, lease, or mortgage the property by a separate instrument without his wife joining with him.

On the other hand, it is maintained by the appellee, that whatever may have been the rule at common law, under our statute the husband can neither lease, mortgage, nor convey property held by him and his wife as tenants by entireties, unless his wife joins him in the execution of the lease, mortgage, or deed.

The first question that is presented for our decision is, whether it is necessary to the creation of an estate by entireties, that the persons to whom the conveyance is made should be described in the deed as husband and wife. The learned counsel for appellant, in support of their position, that it must affirmatively appear in the deed that the grantees are husband and wife, have referred us to 1 Washburn Real Prop. 577, where it is said:

"A still more peculiar joint estate is that which belongs to a husband and wife, where the same is conveyed to them as such." It is claimed that the words "as such" render it necessary for it to be averred and shown upon the face of the deed that the grantees were husband and wife. The above authority seems to support the view taken by appellant, but we are of the opinion that it is in conflict with the very decided weight of authority. But whatever may be the rule at common law, we are of the opinion that under our statute it is not necessary that such fact should be stated in the deed. Sections 7 and 8 of the act concerning conveyances, 1 G. & H. 259, read as follows:

"Sec. 7. All conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common and not in joint tenancy; unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them,

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or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy.

"Sec. 8. The preceding section shall not apply to mortgages, nor to conveyances in trust, nor when made to husband and wife; and every estate vested in executors, or trustees as such, shall be held by them in joint tenancy."

To create a joint tenancy, under the above sections, between persons who are not husband and wife, it is necessary that the intention shall be expressly declared in the instrument, or it must manifestly appear from the tenor of the instrument. And to create a joint tenancy between executors or trustees, the deed must be made to them as such; that is, they must be described as executors or trustees. But the language of the statute is very different in reference to husband and wife. It provides for when the deed is made to husband and wife, that is, to persons who are husband and wife, but the statute does not require that they should be described as such.

This construction of the statute is in harmony with the ruling of this court in *Bevins v. Cline's Adm'r*, 21 Ind. 37, where it was held, "that where a deed is made jointly to a man and woman who are not married, they take by moieties, but if a deed of conveyance is made to a man and woman who are then husband and wife, they take as joint tenants by entireties, not by moieties.

It was held in *Stuckey v. Keefe's Ex'rs*, 26 Pa. St. 397, that "if husband and wife cannot take a conveyance by moieties, if they are absolutely incapable of receiving such a grant, it is clear that no words in the conveyance to them, however clearly expressed, can give them that capacity."

The position contended for by the appellant is, that the nature and extent of the estate created depends upon the words used in the deed of conveyance and not upon the actual relation that existed between the grantees. If this position is correct, it would result that an estate by entireties could be created between a man and woman who were not then husband and wife, if they were described in the deed as hus-

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band and wife. We are of the opinion that when a deed is made to a man and woman, it may be shown by proof that they were actually husband and wife; and, on the other hand, if a deed is made to persons who are described in the deed as husband and wife, that it may be proved that they were not such husband and wife. The description of the grantees in the deed could not amount to more than presumptive evidence, and that presumption might be destroyed by proof showing the actual relation existing between them. If evidence *dehors* the deed is not admissible to prove that the grantees were husband and wife, such evidence would be equally inadmissible to prove that the grantees, though described as such, were not in fact husband and wife.

We have been unable to find any authority that fully sustains the view expressed by Mr. Washburn. The uniform language of the books is, that a deed made to husband and wife creates an estate by entireties; but we regard our statute as decisive of the question.

We are clearly of the opinion that the deed of conveyance, in the case under consideration, having been made to Eldridge G. Mayhew and Sarah Mayhew, and they being then husband and wife, created in them an estate by entireties.

✓ The next question presented for our examination and adjudication is, whether Eldridge G. Mayhew, the husband, at the time of the execution of the mortgage to the appellant, had a mortgageable interest in the property in controversy.

It was a well settled rule at common law, that the same form of words, which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by the entirety. The rule has been changed by our statute above quoted. It requires that the intention to create a joint tenancy shall either be expressly declared, or it must manifestly appear from the tenor of the instrument. But a conveyance to a man and woman, who are then husband and wife, creates an estate by entirety.

✗ The same difference which existed at common law between

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joint tenants and tenants by entireties continues to exist under our statute. In both, the title and estate are joint, and each has the quality of survivorship, but the marked difference between the two consists in this: that in a joint tenancy, either tenant may convey his share to a co-tenant, or even to a stranger, who thereby becomes tenant in common with the other co-tenant; while neither tenant by the entirety can convey his or her interest so as to affect their joint use of the property during their joint lives, or to defeat the right of survivorship upon the death of either of the co-tenants; and there may be a partition between joint tenants, while there can be none between tenants by entireties. See sec. 1 of "an act concerning the partition of lands," 2 G. & H. 361.

Estates by entireties are generally spoken of in the books^x as joint tenancies, but this is not strictly accurate. The confusion in the books would be greatly relieved, if they were designated as tenants in common, joint tenants, and tenants by entireties. If this were done, the name would indicate the nature and quality of the estate spoken of. It was held by this court in *Bevins v. Cline's Adm'r, supra*, that "at common law, if a conveyance be made jointly to a man and woman, who are not married, they take by moieties, as joint tenants, and either can sever such joint tenancy by a conveyance of his or her moiety; but if a conveyance of land be made to a man and woman, who are then husband and wife, they take as joint tenants by entireties, not by moieties; they are seized *per tout*, and not *per my*. Each, as well as both, is entitled to the use of the whole. Neither can sever the joint estate by his own act, as he can in case of an ordinary joint tenancy, but both must unite in the deed to effect a conveyance of any estate in any part of the whole. Nor, it would seem, could the separate interest of either be sold on execution. Indeed, there is no separate interest. See *Cox's Adm'r v. Wood*, 20 Ind. 54."

By the common law, if real estate is conveyed to a husband and wife, they are not thereby constituted joint tenants,

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as in other cases of conveyances made to two persons ; neither are they tenants in common, "for," says Blackstone, "husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are siezed of the entirety *per tout, et non per my*, the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor."

LEWIS, C. J., in *Stuckey v. Keefe's Ex'rs*, 26 Pa. St. 399, defines this peculiar estate as follows: "A conveyance to husband and wife creates neither a tenancy in common nor in joint tenancy. The estate of joint tenants is a unit made up of divisible parts; that of husband and wife is also a unit; but it is made up of indivisible parts. In the first case there are several holders of different moieties or portions, and upon the death of either, the survivor takes a new estate. He acquires, by survivorship, the moiety of his deceased co-tenant. In the last case, although there are two natural persons, they are but one person in law, and upon the death of either, the survivor takes no new estate. It is a mere change in the properties of the legal person holding, and not an alteration in the estate holden. The loss of an adjunct merely reduces the legal personage holding the estate to an individuality identical with the natural person. The whole estate continues in the survivor the same as it would continue in a corporation after the death of one of the corporators. 1 Dana, 244; 7 Yerg. 319. This has been the settled law for centuries. The distinction may seem a nice one, but it is founded upon the nature of marriage, and the rights and incapacities which it establishes. Co. Lit. 6; 1 Thom. Coke, 853; 2 Bl. Com. 182; 5 T. R. 652; 2 Vern. 233; Skin. 182; 19 Wend. 175; 3 Rand. 179; 5 Johns. Ch. 431; 7 Yerg. 319; 1 Barr, 176; 6 Watts & S. 319."

Washburn, in his very valuable work on real property, vol. 1, p. 577, says: "A still more peculiar joint estate is that which belongs to a husband and wife, where the same is conveyed to them as such. If a man and woman, tenants

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in common, marry, they still continue to hold in common. But if the estate is conveyed to them originally as husband and wife, they are neither tenants in common, nor properly joint tenants, though having the right of survivorship, but are what are called tenants by entirety. While such estates have, like a joint tenancy, the quality of survivorship, they differ from that in this essential respect, that neither can convey his or her interest, so as to affect the right of survivorship in the other. They are not seized, in the eye of the law, of moieties, but of entireties."

Chancellor KENT, in his commentaries, says: "If an estate in land be given to the husband and wife, or a joint purchase be made by them during coverture, they are not properly joint tenants, nor tenants in common, for they are but one person in law, and cannot take by moieties. They are both seized of the entirety, and neither can sell without the consent of the other, and the survivor takes the whole."

It was held in *Doe v. Howland*, 8 Cow. 277, per SAVAGE, C. J., that "husband and wife holding lands by a conveyance to them, are not joint tenants. They are seized *per tout*, and not *per my*. They must both join in a conveyance. They are both necessary to make one grantor; and the deed of either without the other is merely void."

Bishop, in his recent work on the Law of Married Women, 621, says: "If the husband undertakes to alien the estate, it is nugatory as against the wife, who may enter as survivor on his death. The books contain a plenty of expressions from which it would even seem further to follow, that the sole conveyance of the husband, whether in terms broad or narrow, carries with it no estate, and is a mere nullity, not only as against the wife who did not join in it, but also as against himself." It is due to this learned author that we should state that he says that the husband has a sort of life interest of his own, distinct from his wife, in the estate by entirety, and this interest he can convey away. We will discuss that question further on in this opinion, where we think it will be made to appear that the husband has no in-

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terest separate or distinct from his wife. This is certainly the rule in this State under our statute.

It was held in *Ketchum v. Walsworth*, 5 Wis. 95, that, "This species of tenancy is *sui generis*, and arises from the unity of husband and wife. As between them there is but one owner, and that is neither the one nor the other, but both together, in their peculiar relationship to each other, constituting the proprietorship of the whole, and of every part and parcel thereof. There can be no partition during coverture, for this would imply a separate interest in each; and for the same reason neither can alien, without the consent of the other, any portion or interest therein; and hence the legal necessity results, that the survivor must take the whole, for the estate being incapable of partition during the life of either, nothing could descend by the death of either. This consequence necessarily results from the nature of the estate, and the legal relation of the parties."

Having ascertained the nature of the peculiar estate by entirety, we proceed to inquire and determine whether Eldridge G. Mayhew had the legal right to encumber the property in question by a mortgage, without the consent and concurrence of his wife.

The learned counsel for appellant earnestly insist that the mortgage executed by Eldridge G. Mayhew alone was valid, and in support of such position refer to and mainly rely upon the following authorities: *Barber v. Harris*, 15 Wend. 615; *Jackson v. McConnell*, 19 Wend. 175; *Bennett v. Child*, 19 Wis. 362; *Ames v. Norman*, 4 Sneed, 683.

We do not think that the case of *Barber v. Harris*, *supra*, supports the position assumed. That was an action of ejectment brought to recover a tract of land. The plaintiff introduced in evidence a mortgage signed and acknowledged by Harris and his wife for the premises in dispute, and proved a statutory foreclosure of the mortgage and a purchase of the premises by himself. The defendant, for the purpose of showing that the mortgage was void and inoperative, read in evidence a deed of the premises covered by

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the mortgage, executed by Peter W. Yates to the defendant, his wife, and their children who are named. The court below held that the plaintiff was entitled to recover two-tenths in fee simple. The Supreme Court, after discussing the nature of an estate by entirety, and holding that the husband cannot forfeit or alien the estate, because the whole of it belongs to the wife as well as to him, proceed to say as follows: "We need not, however, pursue this inquiry, nor express any definitive opinion upon the true construction of the deed to the defendant, his wife and children, because, during the life of the husband, he undoubtedly has the absolute control of the estate of the wife, and can convey or mortgage it for that period. By marriage he acquires, during coverture, the usufruct of all her real estate which she has in fee simple, fee tail or for life. If the wife survives, and is not precluded by her acknowledgment of the mortgage, she may then raise the question as to the nature and extent of the interest she took under this deed." The court in another portion of the opinion say: "The deed from Yates to the defendant and his wife and children, conveyed to them an estate which they held as tenants in common, the defendant and his wife together being the owners of one share, and that probably only for their lives."

The above case differs from the one under consideration in several essential respects. In that case it was doubtful from the peculiar language of the deed, whether Harris and wife held an estate by entirety, while in this there is no doubt on that point. In that case the wife joined with her husband in making the mortgage, while in the case at bar the husband alone made the mortgage. When that case was decided, in 1836, the common law with all of its rigor and strictness prevailed in reference to the power of the husband over the property of his wife, while in this State the common law has been modified by statute, to what extent will be considered hereafter. There can be no doubt that the mortgage of Harris and wife conveyed whatever inter-

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est they had in the property. Such a mortgage would be valid in this State of an estate held by entirety, for the reason that it was jointly made.

The case of *Jackson v. McConnell*, *supra*, was an action of ejectment. The plaintiff claimed under a demise from John S. Suffern. The defence was that the property had been conveyed to Suffern and his wife, and that a separate demise from the husband would sustain the action. The court, after speaking of the nature of an estate by entirety, say: "Various legal consequences arising from such a peculiar estate have also been deduced by the cases. Neither the husband nor wife can, in their own right, alien any part without the concurrence of the other. *Jackson v. Stevens*, 16 Johns. 110, per SPENCER, J.; *Doe v. Howland*, 8 Cowen, 277, per SAVAGE, C. J.; and see 16 Johns. 302. The husband's creditors cannot take his interest in execution, *Rogers v. Gridler*, 1 Dana, 242; *Roanes v. Archer*, 4 Leigh, 550, though it is certainly inferrible from *Barber v. Harris*, 15 Wend. 615, that his right *jure uxoris* might be thus appropriated. *Litchfield v. Cudworth*, 15 Pick. 23; *Stoebler v. Knerr*, 5 Watts, 181; *Brown v. Gale*, 5 N. H. 416; *Schermerhorn v. Miller*, 2 Cowen, 439. That case holds that the husband alone may give a mortgage of such interest. Why, then, can he not enter or give a lease?"

The decision in the above case is a very remarkable legal document. It declares that neither the husband nor the wife can, without the concurrence of the other, alien any part of the estate, and that the husband's creditors cannot take his interest in execution; though it is inferrible from *Barber v. Harris* that such might be done. It is there stated that it was decided in *Schermerhorn v. Miller*, 2 Cowen, 439, that the husband alone might mortgage such interest. The question in the case is then disposed of by the inquiry, "why, then, may he not enter or give a lease?" We have already shown that in the case of *Barber v. Harris*, the mortgage was executed by husband and wife, and that all that was said about the right of the husband to mortgage

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his life estate was *obiter dicta*, and did not have the force and weight of a decision. We have taken the trouble to examine the other cases referred to, and find that none of them sustain the doctrine enunciated.

The question involved and decided in *Litchfield v. Cudworth, supra*, was this: John Cudworth owned certain real estate, which he conveyed to his son, John Cudworth, Jun., and took back a mortgage to secure the support of himself and wife. The son having survived the father died, leaving the mother alive, besides children of his own. Upon the death of John Cudworth, Jun., the estate descended to his children. The question was, whether the children took the estate subject to the mortgage aforesaid, and whether it was liable to pay his debts, if his personal property proved insufficient for that purpose. The court very properly held that the children of John Cudworth, Jun., took the estate subject to the mortgage. There was no question in reference to an estate by entirety raised or decided.

It was held in *Stoebler v. Knerr, supra*, that "an estate conveyed to a husband, for the joint benefit of himself and wife, without words limiting a trust for the separate use of the wife, but excluding the husband from power to sell, may be sold under execution as the estate of the husband." The court say: "The intent of the donor was to give the estate jointly to his daughter and her husband in special tail; but there are no words to limit a trust for the separate use of the daughter; on the contrary, the husband is expressly authorized to hold for their joint benefit. The object was doubtless to provide for the daughter and her issue; but there are no words restrictive of marital rights. The clause restrictive of the husband's right to sell, has respect to voluntary alienation, and not to alienation by process of law."

The point decided in *Brown v. Gale, supra*, was, that "where a husband and wife are seized in her right of a remainder in fee in lands, the husband has an interest in the land, upon which an execution, against him alone, may be extended." The court held that when a husband and wife

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were seized in her right of a remainder, in fee, the husband, by virtue of his marital rights, had an interest in the estate, which might be sold; as in that state a possibility coupled with some present interest was liable to sale upon execution.

The learned judge who delivered the opinion in the above case certainly did not read the case of *Schermerhorn v. Miller, supra*, for he speaks of it as a case where the court had decided that the husband alone might mortgage an estate by entirety. The real case was this: Schermerhorn, Clute, and Mrs. Miller were seized as tenants in common of a certain house and lot. Miller had issue by his wife, born alive. By the marriage and birth of the child, Miller became tenant by the curtesy *initiate*. His interest as such tenant was sold upon execution. The court held that such interest was subject to sale upon execution for his debts. As between Mrs. Miller and the other owners, they were tenants in common, but as between her and her husband, she was the owner in fee, while he was tenant by the curtesy *initiate*, and it was his interest as such tenant that was sold. There was not at common law any tenancy by the curtesy in estates held by entirety, and such tenancy is abolished in this State.

Thus it will be seen that all the cases upon which the decision was based in *Jackson v. McConnell, supra*, are clearly distinguishable from the case under consideration, as in none of them were involved the rights of tenants by the entirety; and neither they nor the decisions based upon them can be regarded as authority by this court.

The case of *Bennett v. Child, supra*, was a proceeding to enjoin the sheriff from making a deed to a certain tract of land and to set aside the sale. The court found the following facts:

That on the 1st of May, 1854, the plaintiffs, as husband and wife, purchased the premises jointly, and took a deed running to them both, and entered jointly into possession, and continued jointly to occupy the premises as a homestead until that time; that nearly one-half of the purchase-

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money was paid out of the separate estate of said Elmira; that the premises were sold by the sheriff, May 23d, 1860, to Child, Gould & Co., on an execution in their favor against John G. Bennett, for a debt contracted subsequently to such joint purchase and occupancy; and that previous to the sale, plaintiff duly notified the sheriff of the condition of the title to said premises. Upon these facts, the court held that the plaintiffs owned the premises as tenants by entirety; that the same was not chargeable with the debts of the husband, and set aside the sale and enjoined further proceedings.

The Supreme Court reversed the judgment of the court below, and held that the premises were properly sold upon said execution. The court say: "All the authorities agree that the husband during coverture cannot alienate the whole or any part of the estate, so as to give title after his death, as against the wife surviving him. But we do not understand that at common law he could not convey his life interest or estate therein."

The court, after referring to and quoting from the opinion in the case of *Barber v. Harris, supra*, proceed to say: "If the husband can convey or mortgage the land, and give to his grantee the use of the entire real estate during his life, we see no good reason why his creditors cannot seize it on execution; for it is clear that under our laws a life estate is subject to be seized and sold on execution. If this interest of the husband is not subject to execution, then he has the right to use, sell, convey, or mortgage real estate of great value, over and above his homestead, which his creditors cannot reach."

It will be observed that the right of creditors to sell the interest of the husband was based upon the supposed right of the husband to convey or mortgage his interest without the concurrence of the wife, and that such right to convey or mortgage was settled in the case of *Barber v. Harris, supra*. The decision is based upon false premises. It assumes that the husband has an interest of his own, distinct from that of the wife, which he alone has the right to alien-

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ate or mortgage. In our judgment, a decision that has no higher or weightier authority to support it than the case of *Barber v. Harris* is entitled to but little weight or consideration. Besides, the court is mistaken as to the consequences that would result from holding that the husband could neither convey nor encumber, without the concurrence of his wife, an estate by entirety, or that the same could not be sold upon execution to satisfy the debts of the husband. It is assumed that it would enable a man to fraudulently conceal and cover up his lands so that the same could not be reached by his creditors. Such would not be the result. The husband could not, by taking a conveyance to himself and wife, defraud his creditors any more than he could effect the same object by taking a conveyance directly to his wife, or to some third person. If an estate by entirety is created to cheat, hinder, or delay creditors, and the husband has not other property subject to sale to pay his debts, the conveyance can be declared fraudulent and set aside in the same manner that any other fraudulent conveyance would be, and such a proceeding would be governed by the same principles of law and rules of evidence as any other proceeding to set aside as fraudulent any other conveyance. The authorities go to the extent of holding that while an estate by entirety exists, it cannot be seized and sold for the debts of the husband, but such estate may be attacked and destroyed on account of fraud.

The case of *Ames v. Norman*, 4 Sneed, 683, involved the right of creditors to have the interest of the husband in an estate by entirety seized and sold upon execution, in satisfaction of the debts of the husband. The court lays down the following proposition of law, which meets with our entire approval, namely: "As a consequence peculiar to this tenancy, it is laid down in the books that, during their joint lives, neither can alien the estate thus held without the consent and concurrence of the other, and the survivor takes the whole estate; neither can sever the joint interest; the whole estate belongs to the wife as well as to the husband,

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and the husband cannot by his own conveyance, the wife not joining therein, divest her estate. 2 Greenleaf's Cruise, 365; 2 Bl. Com. 182; 2 Kent Com. 132; 4 Kent, 363."

The court then proceeded to lay down a proposition of law in direct and irreconcilable conflict with the foregoing. The court say: "From the peculiarity of this tenancy, the unity and indivisibility of the seizin, there is some confusion in the cases respecting the power of the husband alone to make any conveyance or disposition of the land thus held during their joint lives, and also as to the right of creditors of the husband to subject the same to the satisfaction of the husband's debts. But upon examination of the authorities, it appears to be settled that during their joint lives the husband may dispose of the estate. He may lease or mortgage it, or it may be seized and sold upon execution for his debts."

In one paragraph of this learned opinion we are told that during their joint lives, neither can alien the estate thus held without the consent and concurrence of the other, and the survivor takes the whole estate; neither can sever the joint estate; the whole belongs to the wife as well as to the husband, and the husband cannot, by his own conveyance, the wife not joining therein, divest her estate. In support of these sound principles, the court refers to Blackstone, Kent, Cruise, and Greenleaf, four of the most deservedly eminent law writers of England and America.

In the next paragraphs we are informed that there is some confusion in the cases respecting the power of the husband and the rights of creditors, but that upon examination of the authorities, it appears to be settled that during their joint lives the husband may dispose of the estate. He may lease, or mortgage it, or it may be seized and sold upon execution. We are unable to determine what authorities were examined, as no reference is made to any. If neither can alienate the estate, or any part thereof, or sever the joint estate, we do not see how the husband can dispose of the estate during their joint lives, or how he can lease it or mortgage it; or how it can be seized and sold upon execution for his debts,

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if the whole estate belongs to the wife as well as to the husband.

All the authorities agree that there can be no partition of the estate, for the plain and manifest reason that neither has any separate interest. As between husband and wife there is but one owner, and that is neither the one nor the other, but both together. The estate belongs as well to the wife as to the husband. Then, how can the husband possess any interest separate from his wife, or how can he alienate or encumber the estate, when all the authorities agree that the wife can neither convey nor encumber such estate. We are of the opinion that from the peculiar nature of this estate, and from the legal relation of the parties, there must be unity of estate, unity of possession, unity of control, and unity in conveying or encumbering it; and it necessarily and logically results that it cannot be seized and sold upon execution for the separate debts of either the husband or the wife. The estate is placed beyond the exclusive control of either of the parties, or the reach of creditors, unless it can be successfully attacked and set aside for fraud. Any other rule would create injustice and hardship. If the husband can dispose of the estate during their joint lives, the wife is deprived of the enjoyment without her consent. If the husband can, by his separate deed, make a valid mortgage of his interest in fee, then the purchaser upon foreclosure would acquire a fee simple title, which would defeat the right of survivorship. But suppose the husband cannot defeat the right of survivorship, and it is settled by all the authorities that he cannot, upon what principle can it be maintained, that he can by leasing or mortgaging his interest in the estate deprive his wife of the use and enjoyment of it during his life? The property belongs as much to the wife as to the husband, and she has just as clear, undoubted, and equitable a right to the use and enjoyment of the property during the existence of the marriage, as she has to succeed to the estate upon the death of her husband. The opposite doctrine is full of absurdities and gross injustice. If the doctrine contended for by the appellant is

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correct, the husband may, without the consent and concurrence of his wife, lease the property to a stranger, and compel his wife and children to leave the comfortable home that belongs as much to her as to him, and compel them to live in some miserable hovel, while the husband spends his time in riotous living upon the rent derived from the joint estate. In such a case, the wife can have no relief except in the death of her husband. If the husband has a life estate separate and distinct from his wife, then he may mortgage such estate, or it may be seized and sold upon execution for his debts. In either event, the purchaser would acquire just the same interest that the husband had. The purchaser would be entitled to the possession during the life of the husband to the exclusion of the wife. The right of the wife to the joint enjoyment of the estate, during the marriage, is as valuable and sacred as the right of taking the entire estate by survivorship upon the death of her husband. The rights of the wife in the joint property are as sacred as those of the husband, and should be as firmly secured, guarded, and protected by the law as are his. There is an equity in equality, but there is gross iniquity and injustice in permitting the husband to deprive the wife of the use and enjoyment of an estate that does not belong exclusively to either, but to both, and which belongs as much to the wife as to the husband.

If we should hold that the husband, without the consent and concurrence of the wife, could convey or encumber the estate so as to deprive the wife of the use and enjoyment of it during his life, or to defeat the right of survivorship, or that he has some interest in the estate separate and distinct from his wife, which could be seized and sold upon execution for his debts, where the conveyance could not be set aside for fraud, this would be to utterly destroy the nature, quality, essence and incidents of an estate by entirety, and to defeat the plain and manifest intention of the legislature in providing that an estate by entires might continue to exist between husband and wife.

During the constitutional convention of 1850, there was

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an able and exhaustive discussion of the rights of husband and wife. The convention very wisely left the whole question to the legislature. The legislature of 1851-2 assembled soon after the ratification of the constitution by the people. Many of the most influential and distinguished members of the convention were members of this legislature. Upon this body was imposed the delicate and arduous duty of revising the laws of the State, and making them conform to the provisions of the new constitution. Estates at common law had been divided and subdivided, until it was almost impossible for even the best of lawyers to understand the laws. Many of the rules were arbitrary and artificial, and unsuited to our system of government. By the common law, the husband had the absolute control over the property, real and personal, of the wife. That legislature abolished tenancies by curtesy in the husband and dower in the wife, and gave the wife one-third in fee, subject to certain limitations and restrictions. It secured to the wife her separate estate in her lands, and deprived the husband of the power of alienating or encumbering it, without her consent and concurrence. It secured to the wife the rents and profits of her separate estate, and declared that it should not be seized and sold upon execution for the debts of the husband. It abolished estates tail. It modified the common law in reference to joint tenancies, by providing that a joint deed to two or more should be construed to be tenancies in common, unless the intention to create a joint tenancy was expressly declared in the deed, or was made manifestly to appear from the tenor of the instrument. But it did not abolish estates by entireties as between husband and wife, but provided that when a joint deed was made to husband and wife, they should hold by entireties, and not as tenants in common or as joint tenants. The legislature evidently had some purpose in continuing this peculiar estate. What was the purpose? In ascertaining the legislative intention we are required to take into consideration the entire scope of legislation during that session. There was a strong

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and determined purpose manifested to guard and protect the rights of married women. It is quite obvious to us, that the evident and manifest intention of the legislature in providing for the continuance of estates by entireties, as between husband and wife, when joint tenancies between persons who were not married had been virtually abolished, was to provide a mode in which a safe and suitable provision could be made for married women. Various expedients had been resorted to, to effect the same object. Husbands and fathers who desired to provide for sons and daughters had made and caused to be made deeds to trustees in trust for married women, but the more common practice was to make the deeds directly to the wife. Neither of these plans operated well. There was too much machinery and complication about the first. The second was attended with baneful and disastrous consequences. It disturbed the peace and harmony of families. It was an element of strife, contention, and discord. It placed too much power in the wife, and gave her too much control over domestic matters. It destroyed the independence of the husband by making him subordinate to the wife. To remedy this condition of things the legislature continued this estate. It is true that it had existed at common law, but was not very clearly defined or understood; and as it had been regarded as a joint tenancy, and as the virtual abolition of this tenancy would have destroyed estates by entireties, unless expressly saved by the statute, it was so saved and perpetuated. The manifest intention of the legislature was to provide by positive enactment a mode in which a homestead could be created and preserved. It should be the earnest desire of every husband and father to provide a home for his wife and children and a place of repose for himself in his declining years. The power, strength, and prosperity of a state depend upon the peace, happiness, and prosperity of the families of the state. An estate by entireties is better calculated to produce an unity of feeling and interest than any other. It is a bond of union between husband and wife. The homestead does

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not belong to one to the exclusion of the other. There is no feeling of dependence on the part of the husband, as when the title is vested in the wife, and yet it makes each dependent on the other and produces a feeling of conciliation and forbearance. It makes the husband, the wife, and the children feel a joint and common interest in improving, adorning, and preserving their common home. It will inculcate habits of industry and economy. It is the common home of all the household during the joint lives of the husband and wife; and upon the death of either, the survivor takes the whole estate, and thus it continues to be the homestead. But when the title is vested exclusively in the wife, upon her death it will descend, one-third to the husband, and two-thirds to the children, and thus the estate is divided and often wasted, and the home is broken up.

We have examined and duly considered many authorities besides those from which we quoted, a reference to which is here made: *Jackson v. Stevens*, 16 Johns. 110; *Doe v. Parrott*, 5 T. R. 652; *Rogers v. Benson*, 5 Johns. Ch. 431; *Doe v. Howland*, 8 Cowen, 277; *Green v. King*, 2 W. Black. 121; *Den v. Hardenbergh*, 5 Halst. N. J. 42; *Shaw v. Hearsey*, 5 Mass. 521; *Doe v. Garrison*, 1 Dana, 35; *Taul v. Campbell*, 7 Yerg. 319; *Greenlaw v. Greenlaw*, 13 Maine, 182; *Dickinson v. Codwise*, 1 Sandf. Ch. 214; *Thornton v. Thornton*, 3 Rand. 179; *Rogers v. Grider*, 1 Dana, 242.

✕ We have thus far considered this case without reference to our statute in regard to husband and wife, and the power of the husband over the lands of the wife. The statute enacts that "no lands of any married woman, shall be liable for the debts of the husband; but such lands and the profits therefrom, shall be her separate property, as fully as if she was unmarried; provided, that such wife shall have no power to incumber or convey such lands, except by deed, in which her husband shall join." And, again, "The separate deed of the husband, shall convey no interest in the wife's land." 1 G. & H. 374. It was held by this court, in *Davis v.*

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Clark, 26 Ind. 424, that, "under these provisions of the statute" (the ones above quoted) "it is evident that the husband does not, by virtue of the marriage, acquire any legal interest or estate in the lands of the wife, but the same, and the profits thereof, remain her separate property. He cannot, by his separate deed, convey any interest in them, and they are in no wise liable for his debts."

The ruling in the above case is directly in point in the case under consideration, as in that case the property in dispute was held by husband and wife as tenants by entirety, and the question involved was, whether it could be seized and sold upon execution for the debts of the husband, and it was held that it could not be so sold.

The ruling in the above case was followed in *Arnold v. Arnold*, 30 Ind. 305, where the court say: "In *Davis v. Clark*, 26 Ind. 424, this question was settled in favor of the ruling of the court below. It was there held, that at common law, if an estate is granted, as in this case, to a man and his wife, they are neither properly joint tenants nor tenants in common; for husband and wife being considered one person in law, they cannot take the estate by moieties. Both are seized of the entirety, *per tout*, and not *per my*. Neither can dispose of any part of the estate without the assent of the other; but the whole must remain to the survivor."

The above decisions were adhered to by this court in *Simpson v. Pearson*, 31 Ind. 1.

It is maintained, with great ability and earnestness, by the counsel for the appellant, that the sections of the statute upon which the ruling in *Davis v. Clark*, *supra*, was made to depend have exclusive reference to the wife's separate estate, and can have no application to an estate by entirety. We have given that question careful consideration, and while we are of the opinion that an estate by entirety does not come within the strict letter of the statute, yet it comes within the spirit of it. When we take into consideration the various acts that were passed at the session of 1851-2 in

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reference to the marriage relation, we think that it is quite manifest that the legislature intended to deprive the husband of the control over the property of the wife, which he had enjoyed by the common law. It is well settled by all the authorities, that an estate, by entirety belongs as well to the wife as to the husband. It is true that the wife does not hold it as her separate property, but jointly with her husband. But if the doctrines contended for by the appellant are correct, then the wife may be deprived of the joint enjoyment of the property during their joint lives, and her right of survivorship may be destroyed. For if the husband can, without the consent and concurrence of the wife, convey and encumber the estate, she may be deprived of her right of joint enjoyment; and if the property thus held can be seized and sold upon execution, the right of survivorship may be defeated. It is quite clear to us that when the legislature provided that husband and wife should not be tenants in common, but by entireties, the intention was to guard and protect the rights of the wife by depriving the husband of the power to alien or encumber the same without her consent and concurrence, or to charge the same with his debts, or to exercise sole control, or to enjoy exclusive possession thereof.

We are asked to overrule the case of *Davis v. Clark*, *supra*, and the subsequent cases that adhere to the ruling in that case. This we cannot do for several reasons. In the first place, we are of the opinion that the above cases were decided rightly, on general principles, without reference to our statute. In the next place, we would have to overrule the case of *Bevins v. Cline's Adm'r*, *supra*, and all the subsequent cases that follow and adhere to the ruling in that case. The case of *Bevins v. Cline's Adm'r* was decided in 1863, and that of *Davis v. Clark*, in 1866. These decisions have become a rule of property. So strong and so uniform a train of decisions leaves but little room for the court to exercise their judgment on the reasons on which they were founded. A very careful and accurate elementary writer says: "When a de-

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cision involving the title to real estate, and the construction of a statute, has been announced by a court of last resort, and has become a rule of property, it will be overruled only for the most cogent reasons, and upon the strongest conviction of its incorrectness." Ram Leg. Judgm. 237.

We are of the opinion that no error was committed by the court below.

The judgment is affirmed, with costs.

B. F. Davis and *B. F. Love*, for appellant.

E. H. Davis and *C. Wright*, for appellee.

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SCHOOL PROPERTY.—*Part of School Township and School Property Annexed to City.*—*Title to Property.*—Where real estate is purchased and buildings erected for school purposes, by the trustees of a school township, with the proceeds of a special school tax, and subsequently the territory embracing such property is annexed to a city, leaving more than half the school township outside the city limits, the title to the school lots and buildings still remains in the trustees of the school township, and the property may be sold by them. If an equitable division of the proceeds can be made afterward between the school trustees of the township and the city; *Query*, whether the Supreme Court will interfere to prevent such adjustment.

APPEAL from the Marion Circuit Court.

DOWNEY, J.—The appellees, trustees of common schools of the city of Indianapolis, sued the appellant, trustee of Center township, Marion county, alleging that said township purchased, with the funds of the common schools of the State of Indiana, certain real estate which was set apart and used for school purposes, and on which, as we infer, school-houses are situated; that this property was purchased prior to December 20th, 1869, and until that date was not within the corporate limits of said city; that on that day the city

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council annexed certain contiguous territory to said city, and thereby took within its limits the said real estate. Plaintiffs are advised that they have a right to control said real estate; but the defendant, as such trustee, asserts title to and claims the right to possess and control the same, has advertised the same for sale, and threatens to sell the same, and divert it from school purposes in the city, and by said proceeding will cause the plaintiffs' title to be clouded, and destroy their right to the possession and control of the same. Prayer for a temporary injunction, and that on the hearing the title and right of possession of the property may be adjudged in the school trustees of the city, and that the defendant be perpetually enjoined, etc.

The defendant answered, first, the general denial, which was afterward withdrawn; and, second, that it was not true that the said property, or any part of it was purchased with the funds of the common schools of the State, but was purchased and the school-houses built thereon by the trustees of said township, with the proceeds of the special school revenue of the township; that the houses are good and centrally located in the districts which they were intended to supply; that more than half of each of the districts is outside of the city and under the control of the township trustee; that said school-houses are not centrally located for any ward in the city, or for the territory of said districts outside of the city, etc.

There is no direct allegation, either in the complaint or in the answer, of the manner of vesting the title to the property when it was purchased by the township; but we assume that it was vested in the township as required by law.

There was a demurrer by the plaintiffs to the answer, on the ground that it did not state facts sufficient to constitute a defence, which was sustained by the court; and judgment was thereupon rendered for the plaintiffs, as prayed for in the complaint. The defendant appealed to this court, and has assigned as error the sustaining of the demurrer to the answer.

It is provided by statute, that "the title of all lands acquired for school-house purposes, shall be conveyed to the school township, in the corporate name of the township in which the same is situate, except in incorporated towns and cities, and in that case, it shall be in the corporate name of such towns or cities in which the same is situate, for the use of schools therein." 1 G. & H. 570, sec. 2. The first section of this act makes the school township identical with the civil township in boundaries, but not in name exactly. The third section of the act provides that, "in all cases where the title to such lands is vested in any other person or corporation than provided in the preceding section, it shall be the duty of the school trustees of the township, town or city in which the same is situate, to procure the title of such land to be vested as provided in the second section of this act." There is no statute which provides that when part of a township shall be annexed to a city or town, the title to the school-houses, or houses and lots on which they are situated, within the territory thus annexed, shall, by that act, be withdrawn from the school township, as a corporation, and vested in the town or city. There is nothing in reason to support such a theory. It is contrary to all our received and recognized notions concerning the vesting and transferring of the title to real estate. And, as it is unsupported by reason, so, we think, in this case, at least, it is destitute of equity. The money with which the property was purchased and the houses erected was raised by a tax upon the people of the township, and more than half of those for whose use the property was acquired are still outside of the city. If the property shall be adjudged to belong to the city, these persons must lose what they have thus paid. On the other hand, if the property shall be declared to belong to the township, it is only adjudging that the title remains where it was vested, and that those who have become an integral part of another and distinct corporation, have ceased thereby to have any interest in it. It is true that equality, which is

equity, would say that they should share in the property, or its proceeds, in proportion to their numbers or the amount contributed by them to its acquisition.

In *The Inhabitants of School District No. 1 in Stoneham v. Richardson*, 23 Pick. 62, this subject was considered by the Supreme Court of Massachusetts, and this language is used: "In new districting towns it may happen that more than one school-house will fall within the limits of some districts, while others are left without any. So also the mere alteration of the extent of the districts may produce the same result. In the latter case, as the identity of the corporations would remain, it would seem that the property would not be divested, although the school-house, by the newly assigned limits, might fall without the territory of the district and thus be rendered useless for the purpose for which it was made."

In *School District No. 6 in Danvers v. Tapley*, 1 Allen, 49, it was held, that "when a town forms new school districts by abolishing the old ones, the legal title to the existing school-houses vests in those of the new districts within whose territory they happen to fall." This was a case, however, where the corporation which before held the title was entirely extinguished. In this case, the learned judge who delivered the opinion speaks of the language of the court in the case in 23 Pick., *supra*, as a *dictum*, and questions its correctness.

In *Whittier v. Sanborn*, 38 Maine, 32, the case in Pickering is followed, and it was there held by the court, that the alteration by the town of the lines of a school district, whereby its school-house is left within the limits of another district, will not defeat or affect its right of property therein. It may be remarked, that in the case in 23 Pickering and that in 38 Maine, the school-houses were situated on hired land, and the title to the land, and consequently to the houses built on it, was not vested in the old district as it is here vested in the township.

In *Briggs v. School District No. 1 of the Town of Erin Prairie*, 21 Wis. 348, it was held, that when territory

was detached from a school district, and erected into a new district, the old district was alone liable for the debts of the district prior to the separation.

And in the *Township of Saginaw v. School District No. 1 of the City of Saginaw*, 9 Mich. 541, the statement of facts and opinion of the court are as follows: "School District No. 1 of the township of Saginaw was organized in 1837. In 1857 the city of Saginaw was incorporated, the city limits being wholly within the school district, and comprising about one-fourth of the district. A mill tax for schools had been levied and collected in the district the preceding year, and paid over to the township treasurer, which the present action was brought to recover, by the defendant in error, who was plaintiff in the court below. After the incorporation of the city, the officers of the district assumed to act as the officers of School District No. 1 of the city of Saginaw, for that part of the district comprised within the city limits, and to change the name of the district from School District No. 1 of the township of Saginaw, to School District No. 1 of the City of Saginaw. The city charter provides for the election of two school inspectors for the city, and also makes the recorder of the city *ex officio* a school inspector, thereby clearly indicating an intention to sever the city from School District No. 1 of the township of Saginaw; and such we think was its effect. We are also of opinion that while the charter took from the district a part of its territory, it in no other respect deprived it of any of its legal rights, which remain the same after as before. And that however equitable it may be that the city should have its proportion of the mill tax, or other property belonging to the district when the severance took place, we know of no law giving it to the city, or under which it can be claimed by the city as a legal right. Provision is made by statute for such cases when a school district is divided, or a part of one school district is set off to another, by a board of school inspectors, but the case does not come within the law. The question on the trial was one of law for the

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court to decide, and not of fact for the jury. The judgment must be reversed, with costs."

We are referred by counsel for the appellees to the case of *Carson v. The State*, 27 Ind. 465, and it is insisted that that case is decisive of the point involved here. But we do not think so. In the opinion in that case the learned judge says: "The main question involved in the case at bar is, did the town of Hanover, when it became incorporated under the general law, succeed to the rights of the civil township in which it is situated, in the management and control of the public schools within its territorial limits?"

If this was the main question in the case, then there was no question involved as between the school township and the town of Hanover. The civil township and the school township, though they have the same limits, are not the same corporation. 1 G. & H. 637, sec. 4, and 1 G. & H. 570, *supra*. And if the controversy in that case related to "the management and control of the public schools" only, it would seem that no question was involved covering the title to property. It is further said in that opinion that "under the constitution and laws of this State, school property is held in trust for school purposes by the persons or corporations authorized for the time being by statute to control the same. It is in the power of the legislature, at any time, to change the trustee." Now whatever may have been the question in that case, in the one under consideration it is not a question with relation to the change of trustee merely, but it is a change of the *cestui que trust*, or beneficiaries, or the majority of them, which is claimed.

If that case was intended merely to decide that the legislature might at any time change the trustee, then it is not in point here.

Governed by the general principles of law, in the light of the authorities to which we have referred, we have arrived at the conclusion that the legal title to the school-houses and grounds in question remains in the school township of Center, and that the defendant was improperly enjoined from

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selling the same. If there shall be discovered any ground on which an equitable division of the proceeds of the property, when sold, can be effected; or if the corporations interested can agree upon such division, this opinion is not intended to prevent such an adjustment.

The judgment is reversed, with costs, and the cause remanded.

L. Barbour and *C. P. Jacobs*, for appellant.

J. S. Harvey, for appellees.

WRIGHT v. MCGINNIS.

COUNTY AUDITOR.—*Per cent. on School Fund.*—Where a county auditor performs duties in the management of the school funds, and the apportionment cannot be made until his successor takes the office, he is entitled to a proportionate amount of the per cent. allowed on the disbursement of the funds.

APPEAL from the Marion Circuit Court.

WORDEN, C. J.—Action by the appellant against the appellee. Demurrer to the first paragraph of the complaint sustained. Finding for the defendant on the second. New trial refused, and judgment.

The following is the case made: The appellant was the auditor of Marion county, whose term of office expired November 2d, 1867, when he was succeeded by the appellee.

On the 10th of October preceding the expiration of the appellant's term of office, he made his report to the state superintendent of public instruction, of the amount of school revenue for apportionment and distribution, in accordance with sections 110, 111, of the school law. 3 Ind. Stat. 462. Owing to delay on the part of the superintendent, the funds were not apportioned, and hence not disbursed until after the expiration of the appellant's term of office, when the disbursement was made by the appellee. The four per cent. on the disbursement amounted to the sum of two hundred and nineteen dollars and sixty cents, all of which

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the appellee drew from the county treasury on his own warrant or warrants therefor. The appellant has received nothing for the services rendered by him in the management of the fund thus disbursed, and he brings this action to recover the money, or some part of it, thus received by the appellee.

Section 107 of the statute above cited provides, in addition to two specific items not involved here, that "county auditors shall receive for their services in managing the school funds, four per cent. on all disbursements of interest," to be paid, on disbursements being ascertained, in the same manner and out of the same revenue as for other services.

There are many duties required of the county auditors, not necessary to be here enumerated, in the management of the school funds, besides the mere semi-annual disbursement thereof. These duties were all performed by the appellant during his official term, including the report to the superintendent, leaving nothing to be done by his successor, the appellee, in relation to the sum to be disbursed, but simply to disburse the same according to the apportionment made by the superintendent.

The law, it will be seen, does not give the auditors four per cent. for making the disbursements, but four per cent. on the disbursements for their services in managing the funds. The disbursements are referred to as furnishing the measure of compensation merely. To be sure, the amount of the percentage cannot be ascertained or paid until the amount to be disbursed is ascertained; but when ascertained, it furnishes, in connection with the two specific items, the measure of compensation for all the auditor's services in the management of the fund.

As the appellant performed services in the management of the funds, we see no reason why he should not have compensation therefor.

Although the laborer who enters the vineyard at the eleventh hour may, under some circumstances, be entitled to as much as he who has borne the burthen and heat of the

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day, yet we know of no authority for giving him compensation for the entire labor performed, to the exclusion of him who worked the twelve hours.

Each of these parties is entitled to some compensation. The appellant cannot claim it all, because the appellee had a duty to perform in relation to the fund after he came into the office. It was no fault of his that the fund had not been disbursed before his term commenced.

The amount received by the appellee ought to be apportioned between the parties, in accordance with the amount of services rendered by each. If this cannot be agreed upon, it can be settled in the same manner as other disputed questions of fact.

We understand the appellee to claim that as there is no statute which authorizes an apportionment of the compensation, none can be made. Perhaps, if this position is tenable, the appellant would be entitled to the whole sum.

But we think no statute authorizing an apportionment is necessary. Each auditor who performs services in managing the funds is entitled to compensation. But the whole compensation cannot exceed the amount fixed by law; and when the services are rendered by successive auditors, the compensation must be apportioned between them in the manner above stated.

The appellee makes the point, however, that this action will not lie against him, but that the appellant must take his remedy against the county. We are of a different opinion. The appellee has received money which rightfully belongs to the appellant, and an action will lie to recover it. Chit. Con. 7 Am. Ed. 601, *et seq.* and notes.

The demurrer should have been overruled to the first paragraph of the complaint, and a new trial should have been granted as moved for.

The judgment is reversed, with costs, and the cause is remanded.

D. V. Burns, C. Hamlin, and G. S. Wright, for appellant.
J. Hanna and F. Knefler, for appellee.

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THE MARION TOWNSHIP UNION DRAINING COMPANY ET AL
v. NORRIS ET AL.

DRAINING ASSOCIATION.—*Liability of Members.—Judgment.*—Where the members of a draining corporation were sued, with the corporation, for a liability incurred by the company, and the individual members composing the corporation demurred to the complaint, and the demurrer was overruled, and judgment was rendered against the defendants, to be first collected of the assets of the corporation;

Held, that the members of the corporation could not complain of the ruling, as they were not injured thereby, even if their liability was only contingent and secondary.

SAME.—*Answer.—Execution.*—Where the complaint alleged that the corporation had no assets subject to execution, an answer that it had a schedule of assessment of benefits upon land and real estate affected by the construction of its work, duly recorded, etc., exceeding the amount of its liability, was no defence, as such assessments are not subject to an ordinary execution.

APPEAL from the Boone Common Pleas.

BUSKIRK, J.—This was an action in the Boone Court of Common Pleas, wherein the appellees were plaintiffs, and the appellants were defendants, for the breach of a contract between the appellees and the Marion Township Union Draining Company, a body corporate, organized and existing under the act of June 12th, 1852, 1 G & H. 303, for the construction and excavation of a drain, for which the company agreed to pay the appellees, as the work proceeded, at the rate of eighteen cents per cubic yard of excavation, and two dollars per day for cleaning the line of the drain. The appellees sought to recover for work done in part performance of this contract, as well as for damages resulting from an abandonment of the contract by the company, and a refusal by the company to pay for the work as it proceeded, whereby the plaintiffs were compelled to abandon the work.

Peter S. Moore and the other appellants, except the draining company, were made parties defendants, as members of the company at the time of the execution of the contract, and afterward while the work was being done. The complaint avers that the company has no property subject to execution.

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The defendants answer by a general denial, and, by way of set-off, that plaintiffs are indebted to defendants for money had and received, for goods furnished, and for checks and other evidences of the company's debt, delivered at plaintiffs' request; and, by way of counter claim, that defendants are damaged by the plaintiffs' unskilful performance of the work upon the drain.

Moore and the other members of the company, in the sixth paragraph of their answer, say that the draining company "is a lawful corporation, and had, and still has, a large amount of property subject to execution, to wit, the schedule of assessments of benefits upon land and real estate affected by the construction of this drain, to wit, five thousand dollars."

To these answers, except the sixth paragraph, the plaintiffs reply by a general denial.

The defendants, except the draining company, demurred to the complaint, which demurrer the court overruled.

The plaintiffs demurred to the sixth paragraph of the answer of Moore and others, which demurrer the court sustained.

The cause was tried by a jury and resulted in a general verdict in favor of the plaintiffs, and against all of the defendants, for the sum of nine hundred and seventy-nine dollars and seventy-nine cents. The jury also returned answers to special interrogatories. The defendants moved the court for a new trial, and assigned, among other reasons, that the damages assessed were excessive. The plaintiffs remitted the sum of one hundred and fifty-four dollars and seventy-nine cents. The court overruled the motion for a new trial, and rendered judgment for the sum of eight hundred and twenty-five dollars. The judgment provides, that the property of the company shall be exhausted before the property of the individual members of said company shall be seized and sold upon execution.

The defendants excepted to the overruling of their motion for a new trial.

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The appellants have assigned three errors. 1. In overruling the demurrer to the complaint. 2. In sustaining the demurrer to the sixth paragraph of the individual answer of the defendants. 3. In overruling the motion for a new trial.

The third assignment of error cannot be considered by us. The court rendered judgment on the verdict of the jury, on the 16th day of January, 1870. On that day, the defendants prayed an appeal to this court, which was granted, and sixty days therefrom were allowed the defendants, in which to file a bond and bill of exceptions. The bond was filed on the 5th day of February, 1870. It appears from the record that the bill of exceptions was filed on the 8th day of April, 1870, which was beyond the time limited by the court. The bill of exceptions not having been filed within the time limited, constitutes no part of the record. It does not appear when the bill of exceptions was signed by the judge. The presumption will be that it was signed on the day it was filed in the clerk's office. It does not come within the rule laid down by this court in the case of *Albaugh v. James*, 29 Ind. 398, for two reasons; first, in that case the entry was, "And the defendants are given sixty days to prepare their several bills of exceptions;" while in this case the entry is, "And sixty days from this date are allowed said defendants to file such bond, and file their bill of exceptions herein;" second, in that case it appeared of record that the bill of exceptions was signed by the judge within the time limited, but was not filed in the clerk's office until after the sixty days; while in this case, it does not appear when the bill was signed; but it affirmatively appears that it was not filed within the sixty days limited by the court for the filing. All that we decide is, that the case under consideration does not come within the rule laid down in *Albaugh v. James*, *supra*, but we do not want to be understood as approving of that decision, for we entertain grave doubts as to its correctness.

See the numerous decisions collected and referred to on pages 46 and 47 of 2 Davis' Ind. Digest.

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Did the court err in overruling the demurrer to the complaint?

The action was brought against The Marion Township Union Draining Company, and against the individuals who composed such company. The company did not join in the demurrer. The demurrer was filed by and on behalf of the persons who composed such company, and presents for our decision the question of whether the members of such company were primarily or secondarily liable for the debts contracted by such company.

The solution of this question renders it necessary for us to examine the law by which the company was organized, and ascertain the purpose and powers of the company and the extent of the individual liability of the members of such company.

The Marion Township Union Draining Company was a corporation, organized under the act of June 12th, 1852, and the amendment of March 4th, 1859.

These acts confer upon corporations organized under their provisions power to construct levees, drains, or breakwaters, or to do any other work necessary to protect or reclaim wet lands, or lands subject to overflow, whenever any number of persons, not less than five, who may be interested in the construction of any particular levee, drain, or other work, shall associate themselves together in the manner specified in the acts.

The corporations of this kind have no other objects than these, in their inception or in their continuation. When these objects have been attained, the corporation has fulfilled its mission and has no other office to perform. Its work is done, and it may dissolve or expire through inaction. It has no motive to continue its legal existence.

The act of 1852 gives no power to the corporation to hold land or other property. It may indeed hold such property as may be necessary for the construction of the work for which it came into being; but generally the corporation does not find it convenient or practicable to do the work itself,

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through its agents, and to furnish the necessary implements and materials.

It more frequently lets the work out to be done by a contract or at a stipulated price. Thus it may frequently happen that the corporation at no moment in its existence will be the owner of a penny-worth of property that can be levied upon under a writ of execution. Not only is it improbable that the corporation will have property which may be levied upon, but, unless it have property for the purpose of constructing the work it is organized to do, it is not possible for it to hold property according to law.

The doctrine seems now to be well settled, that corporations have no powers except such as are specially granted by the act of incorporation and such as are necessary for the purpose of carrying into effect the powers expressly granted. 2 Kent Com. 299, and cases cited. They can do no acts, and enter into no contracts, except such as may be appropriate as means to the end for which the corporation was created. Bouv. Law Dic., tit. Corporation, 2.

As corporations are the mere creatures of law, established for special purposes, and derive all their powers from the acts creating them, it is perfectly just and proper that they should be obliged strictly to show their authority for the business they assume, and be confined in their operations to the mode and manner and subject-matter prescribed.

The statute of 1852, then, gave to draining companies organized under the same no authority to hold property subject to execution, except impliedly such as should be necessary for the work they were created to do. It was frequently, perhaps generally, unnecessary to hold property even for this purpose. These corporations were thus entirely irresponsible. Their creditors were without the means of enforcing by law satisfaction of their claims.

It was to cure this defect that the statute of 1859 was passed; thereby it became the law, that "all the members of such companies shall be individually liable for all debts contracted by, and damages assessed against any company

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of which he may at any time be a member." 1 G. & H. 305, sec. 4.

The language of this act would seem to impose upon the members of such companies an absolute liability to pay, without any condition whatsoever, all debts contracted by the corporation during their membership. There is no provision in it that the members shall be individually liable in the event of the insolvency of the corporation, or in case the corporation have no property subject to execution. We cannot believe, in view of the mischief sought to be remedied, that the legislature intended to impose a conditional liability.

The act of 1859 is a remedial statute. Such statutes should be construed largely and beneficially, so as to advance the remedy. *Tousey v. Bell*, 23 Ind. 423; *Jackson v. Warren*, 32 Ill. 331; *Smith v. Moffat*, 1 Barb. 65.

In order to discover the true meaning of a statute in a doubtful case, the cause of making it is to be regarded. *Somerset v. Dighton*, 12 Mass. 385.

Statutes are to receive such construction as must evidently have been intended by the legislature, and to ascertain this, the court may look at the object in view, the remedy intended to be afforded, and the mischief to be remedied. *Winslow v. Kimball*, 25 Maine, 493.

Remedial statutes may be construed *ultra*, but not *contra*, the strict letter. *Converse v. Burrows*, 2 Minn. 229; *Crocker v. Crane*, 21 Wend. 211.

This court in *Todhunter v. Randall*, 29 Ind. 275, which was an action against the individual members of a draining company, where a judgment had been obtained against the company and an execution had been returned no property, say: "The objection urged to the paragraph is that it does not sufficiently show that the assets of the company had been exhausted before the commencement of this suit. It is argued by the appellants' counsel that the obligation imposed by the statute on the members of the company is but a collateral one and only attaches when the company be-

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comes insolvent, by all the means in its power to control being exhausted, and that so long as the company has the power to levy assessments on those benefited by the improvement, the members of the corporation are exempt from personal liability.

"We are not prepared to sustain this view of the case. The fourth section of the supplemental act of 1859, 1 G. & H. 305, declares that, 'all the members of such companies shall be individually liable for all debts contracted by, and damages assessed against any company, of which he may at the time be a member.' There is nothing in this section annexing any condition to such liability, except that the debt shall be contracted by the company, or the damages assessed against it, when the person sought to be made responsible is a member thereof. It is by no means clear, that the section does not create an original obligation and render the members of the corporation liable in the first instance. But we do not decide that question, as we are very clear in the opinion that if the obligation imposed by the statute be regarded only as a collateral one, still it is sufficient for the creditor to show that he has been unable by the ordinary process of law to compel payment. That fact is fully shown by the allegations of the second paragraph of the complaint, and the demurrer to it was correctly overruled."

The act of 1859 was a remedial statute, and the legislature having failed to annex any condition to the liability of the members, we are of the opinion we cannot and ought not to annex any. But suppose that the liability of the members is contingent and collateral, and not absolute and unconditional, can the appellants complain of the ruling of the court? Have they been injured by such ruling? We think they have not been injured. It is alleged in the complaint that the company own no property subject to execution; and it is provided in the judgment, "that upon execution of this judgment, the property of the defendant, the Marion Township Union Draining Company, be first ex-

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hausted before proceeding against the property of the defendants, Peter S. Moore and others, members of said company."

By the judgment of the court, the liability of the members of such company is made contingent and secondary. Their property cannot be seized and sold upon execution until all the property of the company has been exhausted. Practically this amounts to the same thing as suing the company alone and obtaining judgment and exhausting the property of the company, and then suing the members upon their individual liability. We are of the opinion that the court committed no error in overruling the demurrer to the complaint.

It remains for us to inquire and determine whether the court erred in sustaining the demurrer to the sixth paragraph of the answer of Peter S. Moore and others, members of said company.

It was alleged in the complaint that the company had no property subject to execution. In answer to this, it is alleged in the sixth paragraph of the answer, that the draining company is a lawful corporation, and had, and still has, a large amount of property subject to execution, to wit, the schedule of assessments of benefits upon land and real estate affected by the construction of this drain, to wit, five thousand dollars.

If the liability of the members of the company is absolute and unconditional, then the answer was clearly and palpably bad; but regarding their liability as collateral, did the matters alleged in the said answer constitute a bar to the action against the members of said company? We think they did not.

The only property which the members allege the corporation owns is "the schedule of assessment of benefits upon land and real estate affected by the construction of its said work, duly recorded, etc., to wit, the sum of five thousand dollars." But choses in action are subject to execution only when made so by statute, or are voluntarily given up to be sold on execution. *M'Clelland v. Hubbard*, 2 Blackf. 361;

 Miller v. The State.

Johnson v. Crawford, 6 Blackf. 377. By reference to 2 G. & H. 239, sec. 435, *et seq.*, it will appear that the property set out in the answer is not subject to execution.

While the assessments of benefits in case of the insolvency of the company and its members might be reached by the creditors of the company, they would not be liable to sale upon an ordinary execution.

If the allegation contained in the answer is true, that the company had a large amount of property subject to execution, then, under the judgment rendered, it will have to be first exhausted, and if it is not true, then the liability of the members of such company attaches, if their liability is collateral. We are of the opinion that the court committed no error in sustaining the demurrer to the sixth paragraph of the answer.

The judgment is affirmed, with costs.

A. J. Boone and *R. W. Harrison*, for appellants.

A. F. Denny and *W. C. Lamb*, for appellees.

 MILLER v. THE STATE.

CRIMINAL LAW.—*Murder.—Manslaughter.—Use of Deadly Weapon.—Malice.*

Instruction.—On a trial for murder, where there were some circumstances strongly tending to the conclusion that the crime was murder, and not manslaughter merely; such as the use of a deadly weapon by the defendant, in a manner seemingly cruel and not justified by the danger of the supposed assault by the deceased, and the following the deceased and inflicting upon him a blow with a knife after he had turned and was retreating; and, on the other hand, there were some circumstances that tended in some degree to modify such conclusion; as that the defendant was smarting under indignities inflicted upon him by the deceased, who a short time before had assaulted and chased defendant with a stable fork through the public streets, until he took refuge; and the deceased had also applied to the accused degrading and humiliating epithets;

Held, that a charge to the jury, which, after defining manslaughter as an unlawful killing without malice express or implied, stated, that "if a man use a deadly weapon in killing his adversary, the law implies malice from its use,

37	432
147	33
37	432
168	507

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except where the killing is excusable," was in effect telling the jury, that there was no such thing as manslaughter where a deadly weapon was used, as the implied malice made it murder, if it was not excusable; and that the charge was erroneous.

SAME.—Mortal Wounds.—Malice.—Where there was doubt as to which of the blows was mortal, this instruction should have been given as requested: "If the blows which caused the death of" A., the deceased, "were given in self-defence, and other blows were afterward given, which were not given in self-defence, not mortal, you should find the defendant not guilty."

APPEAL from the Clay Circuit Court.

WORDEN, C. J.—The appellant was indicted for the murder, in the first degree, of Jacob Howk. On trial by jury, he was acquitted of the degree charged, but convicted of murder in the second degree, and sentenced to imprisonment in the state prison for life.

A motion for a new trial was properly interposed, but overruled, and exception was taken.

The evidence is before us, together with the charges given and refused.

The case made by the evidence is, in substance, as follows: The homicide was committed on the 25th day of May, 1870. It may be inferred that, a few days before the homicide, the defendant owed Howk a small sum of money, or rather Howk claimed that the defendant owed him a small sum. Within a day or two before the homicide, Miller was going to a stable to take care of his horse, and as he was going, Howk drew a stone on Miller, and chased him into the stable, calling him a damned Dutch son-of-a-bitch, and told him to come out and he'd be damned if he did not have what Miller was owing him—seventy-five cents—or have it out of his hide. Miller did not come out, but fastened the door behind him. Miller went in at a door from an alley. Howk tried to get in at that door, but could not; he then jumped over into the lot and went into the stable at another door. Soon after, Miller ran out at the same door at which he went in, and Howk was after him with a drawn stable-fork. He chased Miller around two lots, and up an

alley, to one French's grocery store. At the store, one McClure took the fork from Howk, who seemed inclined to follow Miller into the store, but does not appear to have done so. It is to be inferred, though it is not directly shown by the evidence, that before the homicide, Howk had been fined for an assault or assault and battery upon Miller. Miller was in the employ of George W. French as a butcher. The homicide took place in the latter part of the day above stated. On the day of the homicide, Miller had been out, and when he came back to the store he told French that he had been assaulted by Howk as he was driving along with his team; that Howk had thrown a stone at him. On the day of the homicide, but before its commission, Miller said to one person that he had had a fuss with Howk; he drew out a knife, and said if Howk followed him any more he would kill him. Another person heard him say that if Howk fooled with him, God damn him, he would kill him. Another heard him make the same expression, without the oath. Another witness testifies that Miller was telling about a fuss that he had had with Howk, when he said, "damn him; if he fools with me, I will cut him in two." The witness said to him that he would not do that, but would slap him. Miller replied that he had not the money to pay fines.

A short time before the homicide, Miller was sitting on a porch in front of French's grocery store, when Howk was seen coming in that direction. French told Miller to go in, and he went into the store. A few minutes before Howk came up, Miller said to a witness that if Howk "pitched into him" he intended to cut him, and drew a knife from his pocket and exhibited it, which was identified as the one with which the killing was perpetrated. It is described as a butcher's knife, used for skinning. Howk came up, and looked into the store, and saw Miller, being apparently in an angry mood and somewhat intoxicated. He applied to Miller some opprobrious epithet, which a witness thinks was "damned Dutch son-of-a-bitch," and said that he had paid one twelve dollars, and could or wanted to pay another. French

told him to go away, but he did not seem inclined to go. French told him if he did not go away, he would kick him away. French was standing close to the door, facing outward, and Howk stood in front of him, looking into the store. Howk attempted to push French aside, but did not do so. Howk made a step partially to one side, as if to go in, and as he did so, Miller, who was inside of the store, advanced (if he had not before been within striking distance), and while French stood partially between himself and Howk, struck an overhanded blow at Howk over the arm or shoulder of French with the knife above mentioned. This was rapidly followed by another blow while the parties were facing each other. These two blows in front inflicted wounds which are described as "about the collar bone, and five or six inches long, ranging down toward the cavity of the body." Howk turned and retreated a few feet, and Miller followed him up and struck him another blow with the knife from behind. This blow struck Howk between the shoulders, making a wound ranging downward, the knife penetrating the body from four to five inches. The knife was left adhering in the wound so closely that when afterward withdrawn, as was soon done by a bystander, it had, as the witness expressed it, to be "jerked out." Howk walked a few steps after this and fell, and expired in a few moments. There was no examination of the wounds by any surgeon, and whether death was caused by the wound or wounds in front, or that behind, or all together, can only be judged by the circumstances and the description we have of them.

There is no question made in the cause, except those which arise upon the charges given and refused.

The court gave, amongst others, the following charge:

"Manslaughter is the unlawful killing of a human being, without malice express or implied, but in a sudden heat produced upon sufficient provocation. If a man use a deadly weapon in killing his adversary, the law implies malice from its use, except where the killing is excusable."

The defendant asked the following charge, which was refused:

"20. If the blows which caused the death of Hawk were given in self-defence, and other blows were afterward given, which were not given in self-defence, not mortal, you should find the defendant not guilty."

We have concluded that the charge given by the court, on the subject of manslaughter, was not sufficiently full, and might have left a wrong impression on the minds of the jury as to the law of the case, as applied to the facts. The charge, after describing manslaughter as an unlawful killing, without malice, express or implied, states, that "if a man use a deadly weapon in killing his adversary, the law implies malice from its use, except where the killing is excusable." According to this unqualified charge, there can be no such thing as manslaughter where the killing is with a deadly weapon, because the use of it implies malice, and the homicide must, therefore, be murder, if it be criminal at all.

There are, doubtless, cases in which killing with a deadly weapon would not be excusable, and yet would amount to only manslaughter; and the facts in this case do not so conclusively show that the crime was murder, and not manslaughter, as to render any further explanation of the charge or a fuller statement of the law unnecessary.

An eminent and philosophical writer on the criminal law, in discussing "the act which distinguishes murder from manslaughter, viewed without direct reference to the mental condition of the accused," says: "The first point is, that, whenever a man makes use of what in law is called a deadly weapon, without excuse, if death follows the use, he commits thereby murder, and not manslaughter merely. In other words, the law attributes to him the 'malice aforethought' which makes the homicide murder in distinction from manslaughter." 2 Bishop Crim. Law, secs. 709, 710.

This proposition is laid down, it will be seen, as the law, "viewed without reference to the mental condition of the accused."

The same author, at sec. 720, discusses "the act which distinguishes murder from manslaughter, viewed with direct reference to the mental condition of the accused." Under this sub-title but little is found to our purpose, the author observing that "the question of the intent will be specially considered under our next sub-title," which is (sec. 723), "The act which distinguishes murder from manslaughter, viewed in connection with the conduct of the person killed." The author proceeds: "The crime of murder requires the mind to have acted from deliberation and intelligence; and, where it is clouded by passion, the killing is only manslaughter. This is the general doctrine; but the law has provided rules to determine when the plea of want of mental control may be effectual. The principal illustration of this want is in cases of homicide committed under provocation from the person killed.

"The condition of mind requisite in a case of murder being the matter into which we are now inquiring, we must keep our attention constantly on this point of observation, when looking at the facts of particular cases. And if the killing is really in cool blood, no provocation, however great or sudden, will suffice to reduce it to manslaughter. The question, in short, presented by every homicide of the kind now contemplated is, whether the person who inflicted the injury which resulted in death had really the command of his passions, and acted from a mind undisturbed; or whether reason had lost in part its sway; in which latter case, the further inquiry arises, whether the cause for this loss of reason is one which the law will allow as sufficient to reduce the crime to the lower degree.

"If a man assaults another, the one assaulted may, as we have already seen, strike back in self-defence; but, as we have seen also, he is not on this account entitled to take the assailant's life. Still, as he had the right to strike, the principles already unfolded show, that, if the blow given back is too severe, or if by any other accident it produces death unintended, the person inflicting it is guilty only of

manslaughter, though no passion in him is excited; unless he employs a deadly weapon. If the weapon is deadly, then, supposing the passion not excited, the offence is murder, though committed without any intent to kill. But in those circumstances in which the reason is clouded, if the party assailed uses a deadly weapon, and kills his adversary with it, his offence is only manslaughter. Yet even here, where resistance is made by a deadly weapon, and the weapon is used in a very cruel manner, not justified at all by the nature and danger of the assault, the offence amounts to murder. * * * And where two persons, upon a sudden quarrel, engage in mutual combat, if either one, in the heat of it, kills the other, though with a deadly weapon, his offence is ordinarily only manslaughter; nor is it always material which of the two made the first assault. The same is true, where one makes resistance against an illegal arrest; and, his passions becoming excited by the outrage, he kills the aggressor with a deadly weapon."

From this and other authorities that might be cited, it seems to be clear that where a homicide is committed (though with a deadly weapon) in the heat of passion, caused by sufficient provocation of the person slain; as by an assault, or an assault and battery committed by him upon the slayer, the law does not necessarily imply malice from the use of the deadly weapon; nor is the offence necessarily murder.

It will be remembered that one of the two classes of manslaughter, provided for by our statute consists in the unlawful killing, without malice, "voluntarily, upon a sudden heat."

In the facts of the case before us, there are some circumstances which strongly tend to the conclusion that the crime of the accused was murder, and not manslaughter merely; such as the use of a deadly weapon in a manner seemingly cruel, and not justified by the nature or danger of the supposed assault upon himself by the deceased, and the following up and inflicting a blow upon the deceased, with the knife, after he had turned and was retreating.

But, on the other hand, there are some circumstances that

tend in some degree to modify such conclusion. He was smarting under the indignities inflicted upon him by the deceased, who had assaulted him and chased him, with a stable-fork, from his stable, through the public streets, until he took refuge in his place of business, and some one took the fork from the deceased. The deceased had also applied to the accused degrading and humiliating epithets. Mere words, it is true, furnish no sufficient justification for a deadly assault; but words added to an assault may suffice, when the assault would not alone. 1 Bishop Crim. Law, sec. 729; *Regina v. Sherwood*, 1 Car. & K. 556.

We are not prepared to say that the jury might not have found, under the evidence, that the deceased, at the time of the homicide, was renewing his attack upon the accused; and that the accused was wrought up to such sudden heat by the renewal of the attack, and in view of his recent treatment by the deceased, as to reduce the crime to manslaughter. He was, at least, entitled to have the law stated to the jury more fully and correctly than was done in respect to this view of the case. Had that been done, the jury would have been better enabled to determine understandingly whether the crime committed was murder, or only manslaughter.

We are also of opinion that charge number twenty, asked by the accused, should have been given. From the want of a more thorough examination of the wounds inflicted upon the deceased, it must remain in some degree uncertain which one was the mortal wound, or whether they were all mortal. It may be that the wounds in front were mortal, and the one in the back not mortal. If the wound in the back was not mortal, the appellant should not be convicted of murder for inflicting it; and if those in front were alone mortal, yet if they were inflicted in self-defence (which means, as we understand it, necessary and proper self-defence), he should not be convicted of murder for inflicting them. The charge is correct, as we think, in the abstract, and we cannot say

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that it was so totally irrelevant to the case made as to justify its refusal.

The judgment is reversed, and the cause remanded for a new trial; proper notice to be given for return of prisoner.

S. Claypool, S. W. Curtis, and S. F. Stimpson, for appellant.

J. C. Robinson and B. W. Hanna, Attorney General, for the State.

EUDALY *v.* EUDALY.

PRACTICE.—*Defective Verdict.*—If a jury find on special questions of fact, in answer to interrogatories, without a general verdict, the finding is of no force, and it is error for the court to dismiss the case thereon, or render judgment thereon for the defendant.

APPEAL from the Marion Common Pleas.

PETTIT, J.—This case was a suit for divorce, by the appellant against the appellee.

The answer was the general denial; the case was submitted to a jury for trial. The appellant (who was plaintiff below) asked the court to require the jury, if they found a general verdict, to find specially upon particular questions of fact, which were stated in writing. Some of these particular questions were given to the jury by the court, to which they returned answers; but they did not find a general verdict. Upon the answers to these questions, the court, over the objection and exception of the appellant, dismissed the complaint and rendered final judgment for the appellee; and this ruling is assigned for error. We have no doubt this was error. There was no verdict or finding in law. A jury can only find on special questions when they find a general verdict. If they find on special questions without a general verdict, the court cannot give any weight or force to the

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special findings. We cite, as illustrative of this ruling, *The Board of Comm'rs of Lagrange Co. v. Kromer*, 8 Ind. 446; *Bird v. Lanius*, 7 Ind. 615; *The Michigan, etc., R. R. Co. v. Bivens*, 13 Ind. 263; *The Cleveland, etc., R. R. Co. v. Terry*, 8 Ohio St. 570; 2 G. & H. 205, sec. 336. There being no legal verdict in the case after it was submitted to the jury, it was error in the court to dismiss the complaint.

The judgment is reversed, at the costs of the appellee, and the cause remanded for a new trial.

J. W. Gordon and *W. Patterson*, for appellant.

A. G. Porter, *B. Harrison*, and *C. C. Hines*, for appellee.

 REEVES v. THE STATE, EX REL. ELLIS.

37	441
156	200

BASTARDY.—COMPROMISE.—*Admission of Record.*—A compromise of a suit for bastardy made out of court, though in the form of the statute, is no defence to the action, unless ratified and confirmed in court and entered of record with the consent of the prosecutrix.

SAME.—*Evidence.*—Where the prosecutrix refuses in court to ratify such a compromise and have the same entered of record, she cannot be required to state her reasons for such refusal.

SAME.—*Damages.—Excessive.*—Unless the amount of the judgment in such a case show an abuse of discretion, this court will not interfere on the ground that the damages are excessive.

APPEAL from the Delaware Circuit Court.

BUSKIRK, J.—This was a prosecution for bastardy, commenced before the Mayor of the city of Muncie, where the appellant was adjudged to be the father of the bastard child and was recognized to appear and answer in the circuit court.

In the circuit court, the appellant filed the following answer; namely: "The defendant, for answer to the complaint in the above entitled cause, says that on the 6th day of June, 1868, the said Ellis and defendant, by their written

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agreement, the same being filed herewith and made a part of this answer, as follows:

“STATE OF INDIANA, DELAWARE COUNTY.

“The State, *ex rel.* Lizzie Ellis, v. Elijah J. Reeves.—Whereas I, Lizzie Ellis, am now pregnant, and the child, when born, will be a bastard, and I have commenced an action for bastardy against the said Elijah J. Reeves, charging him with being the father of said child.

“Now, in consideration of the sum of one hundred and seventy-five dollars, to me paid by the said Reeves, I hereby admit that full and entire satisfaction has been made to me for the maintenance of the said child, of which I am now pregnant, by the said Reeves, and for all other claims that I may have against him as expenses of lying in, doctor bills, etc.; and I hereby dismiss the above entitled cause against the said Reeves, and agree that my admission shall be made a matter of record in the court of common pleas or the circuit court of said county, at the next term of either of said courts, that full satisfaction has been made to me by the said Reeves as above stated.

“And I further agree, in consideration of the sum of twenty-five dollars, to me paid by the said Reeves, to release and relinquish any and all claim or claims that I have against him by reason of any breach of marriage contract, seduction, or for any real or supposed cause whatever, and I hereby dismiss any and all actions that may have been commenced against him for anything embraced in this clause of this agreement.

“In witness whereof, I have hereunto set my hand and seal, this 6th day of June, 1868.

(Gov. Stamp.)

LIZZIE ELLIS, [SEAL.]

“Attest: W. BROTHERTON.’

“It is agreed and admitted by plaintiff that full satisfaction had been made by defendant to her for the maintenance and support of the bastard child mentioned in the said agreement. He therefore asks said court to dismiss said cause upon the terms mentioned in said agreement, and that

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her admission be made a matter of record, as therein agreed upon. And for further answer says that he denies each and every allegation therein contained.

“MARCH & BROTHERTON,
“Attorneys for defendant.”

The appellee moved to reject the first paragraph of the above answer. The motion was overruled. The appellee then demurred to the said paragraph of the answer. The demurrer was sustained, and the appellant excepted.

The appellant afterward filed a written motion to dismiss the action, for the reason that the cause had been compromised. The motion was based upon the agreement above set out. The motion was overruled, and an exception was taken.

The cause was, by the agreement of the parties, submitted to the court for trial, and resulted in a finding for the plaintiff. The court overruled a motion for a new trial, and rendered final judgment on the finding.

The appellant has assigned for error in this court, first, the sustaining of the demurrer to the first paragraph of the answer; second, the overruling of the motion to dismiss the action; third, the overruling of the motion for a new trial.

The first question presented for our decision is, did the court err in sustaining the demurrer to the first paragraph of the answer?

The prosecution for bastardy is regulated solely and exclusively by the statute. It is the creature of the statute, and without it would have no existence. The action being created by the statute, and the mode of proceeding and remedy being prescribed by the statute, we must look to our statute for a solution of the question of whether the matters set up in the first paragraph of the answer constituted a valid defence to the action.

The prosecution is in the name of the State, on the relation of the injured party. The mother is made a competent witness by the statute, but she has no interest in the judgment recovered. The judgment is to be applied to the support and education of the child. The court may order the

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money to be paid to the mother; or, if she be dead or an improper person, may appoint some other person to receive and expend the money in the maintenance and education of the child. The death of neither father or mother defeats the action. If the mother dies, the action is prosecuted in the name of the child, by a guardian to be appointed by the court. If the father dies, the action does not abate, but may be prosecuted against his personal representatives. Even the death of the child before judgment will not bar or abate the action, but affects the amount of the judgment. If the child dies after judgment, but before the expiration of the time limited for the last payment on the judgment, the court may make a reduction in the judgment.

This proceeding does not interfere with the right of the mother to maintain an action for her seduction, or of her father, and in case of his death, her mother, to institute an action for the seduction of the daughter.

The only power that is given to the mother of a bastard child over an action for bastardy, after it is commenced, is conferred by the seventeenth section of the act in reference to bastardy. In all other respects she is simply a witness. Said section reads as follows:

"The prosecuting witness may at any time before final judgment, dismiss such suit, if she shall enter of record an admission that provision for the maintenance of the child has been made to her satisfaction; such entry shall be a bar to all other prosecutions for the same cause and purpose."

The question involved in this case was referred to, but was not decided by this court, in the case of *The State v. Wilson*, 16 Ind. 134, where the court say: "Passing over the question, on which we express no opinion, whether a binding contract could be made out of court, without its confirmation in court by the prosecutrix, especially if she is an infant; we are of opinion that to have entitled the supposed defence, in this case, to the consideration of the court, it should have been pleaded as such."

But in *Pickler v. The State*, 18 Ind. 266, the precise ques-

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tion arose, and was decided by this court. The court say:

"As we understand the statute, the court cannot order the entry of admission to be made on the record, unless at the instance of the prosecutrix herself; and until such entry is made, the suit cannot be dismissed. This construction is, it seems to us, correct; and being so, it settles the question; because, in this case, she not only made no motion for leave to make such entry, but disaffirmed all contracts between her and the defendant, relative to the support of the child. The statute evidently requires the admission of the prosecutrix, 'that provision for the maintenance of the child has been made to her satisfaction,' to be confirmed and acted upon by her in court, though such admission may have been made and reduced to writing out of court."

But it is insisted that the above case is not an authority in this case, for the reason that in that case the prosecutrix was a minor. This position is wholly untenable. The court, in that case, in the first instance, discuss the question of whether an infant could execute the instrument therein relied on, and precede the portion above quoted by the remark, "But there is another ground upon which the ruling of the court may be sustained." This remark shows that the court was discussing and deciding the main question without reference to the infancy of the prosecutrix.

This court, in *The State v. Wilson*, 21 Ind. 273, adheres to the ruling in *Pickler v. The State*, *supra*. The court say: "The answer, then, is defective, because it fails to aver that the instrument, which it recites, was, by the consent of the relatrix, entered upon the record. It is not enough to allege, merely, that she filed her admission in court."

Again, the court say: "Here there is no averment that she confirmed and acted upon the alleged admission; but if the facts, alleged in the reply, be true, and the demurrer concedes them to be so, she disaffirmed it."

This court, in *Garner v. Cook*, 30 Ind. 331, held, that a com-

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promise that was not consummated by the necessary proceeding in court to make it obligatory constituted no defence.

This court, in *Carter v. The State*, 32 Ind. 404, again held that the admission must be entered of record. It seems to us that this question should be regarded as settled and "put at rest." We entirely approve of the above decisions. We think they contain the true construction of the statute. We are also of the opinion that the requirement that a compromise made out of court should be confirmed and ratified in court, is founded in wisdom. The manifest object of the statute was to prevent imposition and fraud. The mother of a bastard child is not generally capable of making a fair compromise. She is bowed down with shame and disgrace, is avoided by society, and frequently deserted by her own family. In this forlorn and pitiable condition, she is willing to accede to any terms that may be proposed to her by the man who has wronged and ruined her. Take the case under consideration as an illustration. The prosecutrix agreed to dismiss the action for bastardy for one hundred and seventy-five dollars, and actually agreed to dismiss her own right of action for seduction and a breach of a marriage contract for the miserable pittance of twenty-five dollars. This case demonstrates the wisdom of the legislature in requiring that agreements made out of court should be ratified and confirmed in court, where the rights of the unfortunate mother could be guarded and protected. We do not desire to be understood as expressing the opinion that the mother of a bastard child may not make a valid compromise for her own seduction.

The agreement relied upon in this case is not in conformity with the statute; but as it would have constituted no defence if it had been, it is not necessary for us to determine anything in reference thereto. The learned counsel for the appellant have pressed upon our consideration decisions in England, in Vermont, and other States. Such decisions were based upon statutes in several respects different from ours. If the construction of our statute was for the first

time called in question, such decisions might aid us in placing a correct construction thereon. But there is a long and unbroken line of decisions in this court, all placing the same construction on section seventeen. We think the construction is correct, and adhere to the former rulings on this question.

We are of the opinion that the court committed no error in sustaining the demurrer to the answer.

This conclusion renders it unnecessary for us to examine the second assigned error.

The last question is, did the court err in overruling the motion for a new trial? It is maintained that the court erred, for two reasons:

First, that the court erred in not requiring the prosecuting witness to state her reasons for not entering of record her agreement to dismiss. We are of the opinion that there was no error in this. The law did not require her to do it. She had the option either to do it or not to do it, as seemed to her best at the time. We presume that, if she had been required to answer, she would have said that she had become satisfied that she had made a very unfortunate agreement, and that she did not intend to carry it out, unless required by the law.

The second reason is, that the judgment is excessive. The judgment was for five hundred and twenty-five dollars to be paid in instalments. But it was ordered by the court that the first two instalments herein may be paid by the paying of two several notes as they severally become due, calling for fifty dollars each, and given by said defendant Reeves to the said relatrix Ellis.

It was said by this court in *Marlett v. Wilson's Ex'r*, 30 Ind. 240, in speaking of the liability of the putative father of a bastard child, that "his liability would only be for such judgment as might be rendered in a prosecution for bastardy under the statute, and if no such judgment was obtained there would be no liability whatever upon him. The natural obligation of the father to maintain his bastard offspring

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cannot be enforced as in the case of a legitimate child. The question of paternity must be settled by proceedings for that purpose, and such proceedings determine the whole extent and fix the limits of his legal obligation."

It was held by this court, in *Medler v. The State*, 26 Ind. 171, that "where the amount of the judgment is not such as to show an abuse of discretion, this court ought not to interfere in such cases upon that ground."

We are clearly of the opinion that there was no abuse of the discretion of the court, in rendering judgment in this case.

It is also claimed by the appellant that there was a mistrial, for the reason that there was no reply filed to the third paragraph of the answer. The appellant, by going to trial without insisting upon a reply, waived all objection thereto, and he cannot be heard to complain in this court. *Train v. Gridley*, 36 Ind. 241.

The judgment is affirmed, with costs and five per cent damages.

W. March and *W. Brotherton*, for appellant.

T. F. Sample, for appellee.

37	448
132	141
37	448
152	335

THE MICHIGAN SOUTHERN AND NORTHERN INDIANA RAILROAD
COMPANY *v.* HEATON.

COMMON CARRIER.—*Negligence.—Liability.*—A common carrier cannot, by contract, relieve himself from liability for the loss of goods delivered to him for transportation, which has been occasioned by his own negligence, or that of his agents or servants, or where such negligence has, in any degree, contributed to such loss. A common carrier can no more stipulate for a slight degree of negligence than he can for gross negligence.

APPEAL from the St. Joseph Common Pleas.

WORDEN, C. J.—This was an action by Heaton, the appellee, against the railroad company, to recover the value of

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certain wheat delivered by him to the company, to be transported by the latter as a common carrier over ~~her~~ railroad from Bristol, the point of shipment, to Toledo, in the State of Ohio. The wheat, while thus in the possession of the company, and stored in one of her warehouses, and before being transported, was destroyed by fire. Judgment for plaintiff on the verdict of a jury.

The case comes before us on a bill of exceptions, showing the following facts: "It was proven, or admitted, that the defendant is a common carrier, as stated in the complaint, and that the plaintiff delivered to the defendant, at its station in Bristol, Indiana, 927 $\frac{1}{2}$ bushels of wheat, of the value of two dollars and three cents per bushel, to be transported to Toledo, in the State of Ohio, and that on the 12th day of September, 1867, the same was, together with the warehouse, consumed by fire. At the proper time, the defendant gave evidence proper to be submitted to the jury tending to prove the following facts, to wit: That said wheat was received by the defendant at said warehouse for such shipment under a special contract contained in the bill of lading, a copy of which is set forth in the complaint and in the third paragraph of the answer, and which contains, among other things, the following clause, to wit: 'This company shall not be held liable for any delay in the transportation or delivery of said grain, or for any injury from heat or dampness, or for any deterioration in quality, or loss by fire, or accident, or shrinkage, while in possession of the company;' and that the defendant used care and diligence in guarding said wheat from damage or loss by fire. And evidence was also given by the plaintiff tending to prove want of care and diligence on the part of the defendant in guarding said wheat against loss by fire, but the case was so left by the evidence that the extent or degree of such care, or the want of it, was a question for the consideration of the jury." And thereupon the defendant asked the following instructions, which were refused:

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“First, if the jury find, from the evidence, that the wheat in controversy was received by the defendant for shipment only under the terms and conditions mentioned in the receipts or bills of lading set forth in the complaint and in the answer, and which has been given in evidence, then the defendant is to be held liable in regard to the wheat only to the same extent as a private carrier for hire would be, and not as a common carrier; that is to say, in such case, the defendant was bound only to use such diligence in guarding the wheat against danger of loss by fire as any prudent man commonly uses to save his own goods from loss by fire. It (the defendant) was required to use in regard to the same only ordinary diligence, and the defendant can be held liable only for the want of that degree of care, and not for the extraordinary care required of common carriers.”

“Second, if the jury find from the evidence that the wheat in controversy was received by the defendant for shipment only under the conditions mentioned in said receipt, and that such conditions were at the time understood and assented to by the plaintiff, then the defendant, as to guarding the wheat against loss by fire, was not bound to use extreme care or diligence, such as is ordinarily required of common carriers, but was bound to use only that degree of care and diligence in that respect which ordinarily prudent men commonly exercise in regard to their own affairs of similar character, and is liable only for the want of that degree of care.”

The court gave the following charge:

“This is an action brought against the Michigan Southern and Northern Indiana Railroad Company as a common carrier, for the value of a quantity of wheat delivered to them to be carried from Bristol to Toledo. The wheat was stored in the warehouse of the company for transportation, but before it was moved forward, the building with its contents was destroyed by fire. The railroad company as a common carrier are regarded by the law as insurers of the property intrusted to them, and are legally responsible for acts against which they could not provide from whatever cause arising,

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the acts of God and the public enemy only excepted. The loss or damage to property in their possession to be carried, is, of itself, sufficient proof of negligence—the rule of law being, that everything is negligence which the law does not excuse—so that in all cases but those just mentioned as excepted, their faultlessness is no discharge. This responsibility of a common carrier may, however, be limited by contract. In this case, it is stipulated between the parties that the defendant is not to be responsible, among other things, for any loss by fire: but this general provision in the contract does not relieve the defendant from their responsibility as a common carrier, if the loss by fire was caused by negligence or want of care on their part. So that if the jury find, from the evidence before them, that the property mentioned in the complaint was lost or destroyed by the want of care or negligence of the defendant, they will find for the plaintiff, the value of the property lost or destroyed. But if the property, while in the warehouse, was not destroyed in consequence of their want of care or negligence, you will find for the defendant.”

The following second charge, on this point, was given at the request of the plaintiff:

“2. Notwithstanding the limitation of the company's liability for loss by fire contained in the receipt given, still the company is liable for a loss by fire if there was carelessness or negligence of the company or its employees in connection with the fire and contributing to the loss.”

The appellant duly excepted to the rulings of the court in charging and in refusing to charge as asked.

The question is presented by the record, arising out of the charges given and those refused, whether a common carrier is exempted, by such special contract, from liability for the loss of goods by fire, where the loss has been occasioned by any degree of negligence on the part of the carrier which has contributed to the loss.

The counsel for the appellant do not claim that the carrier would be exempt from liability for a loss by fire occur-

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ring from the gross carelessness, or want of ordinary care, on the part of the carrier or his agents or servants; but they claim that the carrier, under such a contract, is only bound to use such degree of care in guarding the property against loss by fire as ordinarily prudent men would use under similar circumstances; in other words, such care as the law requires of an ordinary bailee, or private carrier for hire.

The appellee, on the other hand, claims that the carrier, under such contract, is liable for the loss of the goods by fire, where the loss has occurred through any degree of negligence on the part of the carrier, his agents or servants, which has contributed to the loss. We think it must be regarded as settled by the numerous authorities on the subject, that a common carrier may, by special contract, relieve himself to some extent from the strict liability which the law imposes upon him as such common carrier. *York Company v. Central Railroad*, 3 Wal. 107. But while this is the case, we are of opinion that a common carrier cannot, by contract, relieve himself from liability for the loss of goods delivered to him for transportation, which loss has been occasioned by his own negligence or that of his agents or servants, or where such negligence has in any degree contributed to the loss. And it matters not what degree of negligence has thus occasioned or contributed to the loss. A carrier can no more stipulate for a slight degree of negligence than he can for gross negligence. A common carrier, and especially one exercising and enjoying corporate franchises, granted, as is supposed for a public purpose and for the public benefit, cannot, in our opinion, be permitted to so far disregard the duty which he or it owes to the public, as to stipulate for any degree of negligence in the discharge of duty as such common carrier. It is not simply a question between the carrier and the single individual with whom the contract is made. It is a question of public interest on the one hand, and public duty on the other. If such contract can be made and is to be held valid in one instance, it follows that if made in all cases, it must be held valid in all cases. The

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carrier may thus force these terms upon the shipper, who must either accept them, or forego the transportation of his goods by means of the common carrier, or resort to his action against the carrier for refusing to transport his goods without such stipulations, which practically would be an inadequate remedy, rather than resort to which, the shipper would generally submit to the carrier's terms. The common carrier may thus divest himself of that character, and force the public, through its necessities, to intrust the transportation of goods to carriers irresponsible for negligence.

The case of *N. Y. Steam Nav. Co. v. Merchants' Bank*, 6 How. U.S. 344, is relied upon by the appellant as establishing that under such contract the appellant would only be liable for gross neglect, or want of ordinary care. We do not think it clear that the case establishes the position assumed. William F. Harnden had shipped on the steamboat Lexington, to be transported from New York to Stonington, in Connecticut, a quantity of coin. On the way, a fire broke out, which destroyed the boat, and the money was lost. The court state the agreement under which the coin was to be transported, as follows: "The special agreement, in this case, under which the goods were shipped, provided that they should be conveyed at the risk of Harnden; and that the respondents were not to be accountable to him or to his employers, in any event, for loss or damage."

The court say: "If it is competent at all for the carrier to stipulate for the gross negligence of himself, and his servants or agents, in the transportation of the goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties." Why was the court speaking of gross negligence? Simply because it was a case of gross negligence with which it had to deal. There was no question whether a less degree would have been sufficient to render the respondents liable. The court was speaking of the case as it existed, and as one of gross negligence. This is clearly shown by what is said, on page 385, on the subject. It is there said: "We think there was

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great want of care, and which amounted to gross negligence, on the part of the respondents, in the stowage of the cotton," etc.

The following paragraph, on the same page, would seem to indicate that if there was any fault on the part of the respondents, they would be liable:

"It is, indeed, difficult, on studying the facts, to resist the conclusion, that, if there had been no fault on board in the particulars mentioned, and the emergency had been met by the officers and crew with ordinary firmness and deliberation, the terrible calamity that befell the vessel and nearly all on board would have been arrested. We are of opinion, therefore, that the respondents are liable for the loss of the specie, notwithstanding the special agreement under which it was shipped."

The same court, in the case of *The Steamboat New World v. King*, 16 How. U. S. 469, seemed inclined, for some purposes, at least, to repudiate all distinctions in the degrees of negligence, as ordinarily classified. Mr. Justice CURTIS, in delivering the opinion of the court, remarks: "The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. * * If the law furnishes no definition of the terms gross negligence, or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine, in each case, what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned."

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We, however, do not wish to be understood as deciding that in no case does the distinction in the degrees of negligence exist.

The case of *Graham v. Davis*, 4 Ohio St. 362, very fully sustains the view which we take of the question before us. We quote the following paragraph from the opinion of the court in that case, delivered by Judge RANNEY:

"The whole may be summed up in this: the carrier, by agreement with the owner, may exonerate himself from responsibility for losses, arising from causes over which he has no control, and to which his own fault or negligence has in no way contributed. But in doing so, he does not cease to be a common carrier, nor in any manner change his relation to the public as such; and he can only excuse himself for a failure to deliver the goods entrusted to him by showing that, without his fault, he has been prevented by some one of the causes recognized by law, or specifically provided for in the contract. This case requires very little to be added, as to the degree of care exacted of the common carrier. We have already said, that he is not at liberty to stipulate for any degree of negligence, and that a loss from negligence cannot be within the stipulated exceptions to his liability."

The case of *Steinweg v. The Erie Railway*, 43 N. Y. 123, is also directly in point. There the bill of lading released the carrier from liability for damage or loss by fire or explosion of any kind. It was held that the carrier was not released from liability for damage by those means, resulting from his own negligence. And it was held that the carrier, a corporation, "was liable, if there was negligence on its part, without regard to any supposed distinctions or degrees of negligence."

This is the doctrine of the Supreme Court of the United States, also, as is to be inferred from what is said in the case in 3 Wal. above cited. There Mr. Justice FIELD, in delivering the opinion of the court, after having made a very clear statement of the duties and responsibilities resting upon common carriers, proceeds as follows: "The owner of

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goods may rely upon this responsibility imposed by the common law, which can only be restricted and qualified when he expressly stipulates for the restriction and qualification. But when such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement." Had it been the intention of the court to discriminate between different degrees of negligence, and to hold that some could and some could not be contracted for by the carrier, they would not have used the general term negligence, which includes all classes, whether slight or gross, as expressive of what could not be contracted for.

There may be, and probably are, some cases, as well as some *dicta*, in the books, at variance with the doctrine on which we stand in this case; but we are satisfied that it is in accordance with principle, and is supported by very respectable, if not the great weight of authority.

Effect can be given to the clause in the bill of lading stipulating that the company shall not be liable for any loss by fire or accident. By the law, independently of any contract providing otherwise, the carrier is chargeable for all losses except such as may be occasioned by the act of God or the public enemy. He insures against all accidents which result from human agency, although occurring without any fault or neglect on his part. Had the wheat been lost by fire, without any negligence on the part of the company, the clause in the bill of lading would, doubtless, have exempted the company from the liability therefor, which the law would otherwise have imposed.

We are of opinion that the court committed no error, either in giving or withholding charges, and that the case went to the jury on the correct theory of the law.

The judgment below is affirmed, with costs and five per cent. damages.

J. B. Niles, W. Niles, and J. O. Norton, for appellant.

J. H. Baker, J. A. S. Mitchell, W. A. Woods, and J. D. Arnold, for appellee.

NUTZENHOLSTER ET AL. v. THE STATE, EX REL. SUMNER ET AL.

OFFICIAL BOND.—*Demand Before Suit.*—In a suit on a constable's bond for failure to pay over money collected by him, to a justice of the peace, within a month after he has collected the same, no demand on the constable need be alleged or proved.

SAME.—*Evidence.*—*Authenticated Copy.*—An authenticated copy, under section 283 of the code, of a constable's bond, is admissible in evidence without proof of its execution, in a suit on the bond against the administrator of one of the sureties.

JUDGMENT.—*Irregularity.*—*Collateral Proceeding.*—In such an action, the officer or his surety cannot object to the original judgment or execution on which the money has been collected by the constable, on account of an irregularity, in that the names of the plaintiffs are given as a partnership.

APPEAL from the Madison Common Pleas.

BUSKIRK, J.—This was a suit upon a constable's bond, for a failure to properly account for money by him collected. Nutzenholster, as constable, executed his bond, with P. D. Kemp as surety. The breach complained of was, that the relators had recovered a judgment before a justice of the peace against one John Bender, upon which an execution had been issued and delivered to the constable; that while the same was so in the hands of the said constable, Bender paid to him the full amount of the principal, interest, and costs of the said judgment; that the said constable had failed and neglected to return the said execution, or to pay the said money so by him collected to the relators, or to the justice of the peace, but had embezzled the same.

The death of Kemp and the appointment of Davis as his administrator were alleged. A copy of the constable's bond, and of the judgment in favor of the relators and against Bender, and the subsequent proceedings thereon, was filed with the complaint. The defendants jointly, and Davis separately, demurred to the complaint. The demurrers were overruled, and proper exceptions were taken.

The cause was, by the agreement of the parties, submitted to the court for trial, who found for the plaintiff and over a motion for a new trial, rendered judgment on the finding.

Two errors have been assigned and argued by the counsel for the appellants; first, that the court erred in overruling the demurrer to the complaint; second, that the court erred in overruling the motion for a new trial.

The objection urged to the complaint is, that there is no averment that a demand was made of the constable for the money by him so collected before the commencement of the action.

Was a demand necessary?

It is alleged in the complaint that the money was collected by the constable in November, 1869. This action was commenced on the 29th day of July, 1870. It was also alleged in the complaint, "that the said Nutzenholster has wholly failed, neglected, and refused to pay over to the said justice, the plaintiff, or any other rightful authority said sum of money, or any part thereof, and has failed to make return of said execution, and has embezzled said judgment, interest, and costs."

The general rule is, that where a person acquires the possession of money or property lawfully, or with the consent of the owner, a demand is necessary before an action is brought. *English v. Devarro*, 5 Blackf. 588; *Underwood v. Tatham*, 1 Ind. 276; *Black v. Hersch*, 18 Ind. 342; *Conner v. Comstock*, 17 Ind. 90.

But the question of a demand, in the case under consideration, is regulated and must be determined by the statute. The fourth clause of section 3 of an act regulating the number and defining the powers and duties of constables (approved May 27th, 1852) makes it the duty of a constable "to pay over to the proper plaintiff, or to the proper justice, without delay, all money by him collected by virtue of any writ."

By section 9 of said act, it is provided, that "any constable who shall make any false return of any writ, or who shall fail to return the same at the return day thereof, or who shall fail to discharge any duties incumbent on him by law, shall, with his sureties, be liable on his bond to the person injured, to the extent of the injury, with ten per cent. damages thereon."

Section 10 of said act reads as follows: "Any constable who shall fail to pay over to the proper person, on demand, or to the proper justice, within one month after the receipt of the same, any money he may have collected by virtue of his office, shall, with his sureties, be liable on his bond to the person injured, for such money and twenty-five per cent. in damages on the amount."

We are, for the first time, required to place a construction upon the above section. The language is very ambiguous, and badly chosen to express what seems to have been the legislative intention. We have, with some hesitation, come to the conclusion that the true interpretation of the above section is, that where the action is brought for the failure of the constable to pay the money to the execution plaintiff, or his agent, a demand is necessary before the commencement of the action; but such constable is liable to an action on his bond for a failure to pay the money to the proper justice within one month after the receipt of the same, without any demand being made therefor. If a demand is made of the constable for the money by the plaintiff or his agent, he is compelled to pay the money immediately on the demand being made, and for a failure so to pay on demand, he and his sureties are at once liable to an action on his bond; but if no such demand is made of him, he is required to pay the money to the proper justice within one month after the receipt of the same, and a failure to do so will render him liable to an action on his official bond, and in such action it will not be necessary either to allege or prove a demand. When a demand is necessary, it need not be made of the officer while he is in office, but it will be sufficient if made at any time before the commencement of the action. *Parker v. The State*, 8 Blackf. 292.

We are of the opinion that the facts stated in the complaint rendered unnecessary any demand, and that the court committed no error in overruling the demurrer to the complaint.

It is also claimed that the court erred in overruling the

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motion for a new trial, and in support of this assignment of error two questions are discussed.

The first is, that the court erred in admitting in evidence, over the objection and exception of the appellants, the bond of the constable, without proof that the same had been executed by Kemp, the surety on such bond.

It is claimed by the appellees, that the bond, having been duly authenticated as provided by sec. 283 of the code, 2 G. & H. 183, was admissible in evidence without proof of its execution either by the constable or his surety.

But it is maintained by the appellants, that while the above position may be correct when applied to the constable, when applied to the other appellant it is incorrect, for the reason that Kemp, the surety, was dead, and the action was being prosecuted against his administrator, and that as to him it was necessary to prove that the bond had been executed by the surety, and in support of this position reference is made to the cases of *Riser v. Snoddy*, 7 Ind. 442, and *Mahon's Adm'r v. Sawyer*, 18 Ind. 73.

The case of *Riser v. Snoddy*, *supra*, was a proceeding by the administrator against heirs of a decedent, to obtain an order for the sale of real estate to pay the debts of such decedent. To prove that it was necessary to convert real estate into money to pay debts, the administrator, over the objection and exception of the heirs, was permitted to read in evidence certain notes, which purported to have been executed by the decedent without proof of his handwriting.

It was claimed that the notes were properly admitted under section 80 of the code, 2 G. & H. 105, without proof, the execution thereof not having been denied under oath. This court say: "This suit was not against a party to the notes, nor were they read in evidence 'against such party.' The case, therefore, is not within the language of the statute. Is it embraced by its spirit? We think not. The maker of an instrument would know it, and if one were presented with his signature which he did not make, he would know it. Hence, it is reasonable to require him to deny instru-

ments signed with his signature, under oath, if at all. Not so as to his heirs, or others not purporting to be makers of the instruments. Heirs involved in suits like the present are generally, as in this case, minors, who are incapable of making even an admission, and against whom proof on all points is always required. They could not be expected to know, in all cases, the genuineness of a parent's signature, and be prepared to admit or deny it, in every given instance; and it would be unreasonable to require them to so do."

It was held by this court in *Mahon's Adm'r v. Sawyer, supra*, that "in an action upon a note or written contract, against the estate of the maker, the handwriting or execution of the note or contract must be proven, section 80, 2 G. & H. 105, being inapplicable to such cases."

While the appellees admit that the above decisions were correct, as applied to the facts of such cases, they insist that they have no application to official bonds.

This action does not come within the letter of section 80 of the code, *supra*. Does it come within its spirit? We think this case is not governed by section 80 of the code, but is governed by other sections of the statute. Section 14 of an act touching official bonds and oaths, 1 G. & H. 164, provides, that "a copy of any official bond legally certified, shall be received as evidence, and suit maintained thereon as on the original." The matter stands thus: section 5 of the above act requires the bonds of constables to be filed with the clerk, who has to record the same. Section 283, 2 G. & H. 183, provides for sworn copies of records, bonds, etc. Then section 14 above quoted makes such copy evidence. We are of the opinion that the court committed no error in admitting in evidence the copy of the bond, without proof of its execution. It is next maintained by the appellants that the court erred in admitting in evidence, over the objection and exception of the appellants, the transcript of the judgment and proceedings in favor of the relators and against Bender, for the reason that the judg-

ment was rendered in the name of William Sumner & Co., and that the execution was issued in that name.

We think there is nothing in the objection. The transcript was properly admitted. The appellants are estopped from denying the regularity of the judgment, by having acted upon the execution and collected the money thereon.

This court, in the case of *The State v. Hicks*, 2 Blackf. 336, which was a suit upon the official bond of the sheriff, for failure to pay over money collected on an execution, say: "The second assignment rests on better authority. In the case of *Wakefield v. Lithgow*, 3 Mass. 251, it was decided, that where a sheriff has collected money on an execution, he is bound to pay it over to the execution-plaintiff on demand. Where the writ is from a court of competent jurisdiction, an error or irregularity in the rendition of the judgment, or in the previous proceedings, furnishes no excuse to the officer for withholding the money. The sheriff recognized the legality and authority of the execution by acting upon it; and after having collected the money, it is not for him to say that the writ was illegal or unauthorized by the judgment. In the case of *Smith v. Bowker*, 1 Mass. 81, it was held that the officer is not holden to look beyond his execution; and, whether the judgment be erroneous or not, is a question with which he has nothing to do. See, also, *The People v. Waters*, 1 Johns. Cas. 137."

The above decision is directly in point, and is decisive of the point under consideration.

We, therefore, hold that the court committed no error in admitting in evidence the transcript of the judgment, and subsequent proceedings.

The Judgment is affirmed, with costs.

W. R. Pierse and *H. D. Thompson*, for appellants.

M. S. Robinson, for appellees.

 Knight *et al.* v. McDonald *et al.*

GORDEN v. GARR ET AL.

PRACTICE.—*Motion to Strike Out.*—A motion to strike out cannot perform the office of a demurrer.

APPEAL from the Jasper Circuit Court.

WORDEN, C. J.—Action by the appellees against the appellant upon two promissory notes executed by the defendant to the plaintiffs. Judgment for plaintiffs.

There were two paragraphs in the complaint; one upon each of the notes; and copies of the notes were set out.

The only errors assigned are upon the rulings of the court in overruling motions to strike out, respectively, each paragraph of the complaint.

It is claimed here, against the ruling below, that the paragraphs are defective in not stating facts sufficient, etc.

A motion to strike out does not perform the office of a demurrer. Besides this, the respective paragraphs are good on demurrer. The question of time seems to be the important one in the cause.

The judgment below is affirmed, with costs and ten per cent. damages.

*R. S. Dwiggin*s, for appellant.

E. P. Hammond and *T. J. Spitler*, for appellees.

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REAL ESTATE, RECOVERY OF.—*Pleading.*—A complaint is sufficient in an action for the recovery of real estate, if it contain the substance required by the statute.

MARRIED WOMAN.—A married woman may, during coverture under her third marriage, maintain an action for the recovery of real estate which came to her on the death of her first husband, by descent from him, and which she attempted to convey during coverture under her second marriage.

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APPEAL from the Shelby Circuit Court.

PERTIT, J.—The complaint is as follows, in substance and effect: The plaintiffs complain of the defendants, and say that on the 30th day of January, 1856, one Henry Gird died, being the owner in fee simple of certain described real estate in said county, and left him surviving the plaintiff, Margaret, his widow, and John Gird, Laura Gird, and Henry Gird, Jr., and that John Gird and Laura Gird are still living; that Henry Gird, Jr., died on the — day of —, 1857; that afterward, on the — day of —, the lands of which Henry Gird, Sr., died seized were divided among his said children and the said Margaret, his widow, and that the lands sued for, and particularly described, were set off to said widow; that afterward the said Margaret intermarried with Charles Coulter, January 7th, 1857; and while Margaret was the wife of the said Charles Coulter, on the 18th day of April, 1858, they sold and, by deed of that date, attempted to convey the land set off and assigned to Margaret, as the widow of Henry Gird, Sr., to one Philip Hoop for nine hundred and fifty dollars, which was paid to and received by said Charles Coulter. And at the time of the sale and conveyance Margaret was the wife of said Coulter, and could not and did not convey any title to the land; and that after making said deed, on the — day of —, 1865, Coulter died, leaving said Margaret his widow; and that on the 27th day of August, 1870, the plaintiffs were married and are now husband and wife; and that the said Margaret E. Knight, in her own separate right of estate, is the owner of said land in fee simple, and entitled to the immediate possession of the same; and that defendants hold possession thereof without right, and for twelve years last past have wrongfully kept her out of possession. Judgment for possession and one thousand dollars damages, for being kept out of possession, is demanded.

To this complaint there was a demurrer, for want of sufficient facts, sustained, and this ruling presents the only question in the case. Was the complaint sufficient? We think

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and hold that it was. In actions for the recovery of real property, it is provided by statute (2 G. & H. 282, sec. 595), that "the plaintiff in his complaint shall state that he is entitled to the possession of the premises, particularly describing them, the interest he claims therein, and that the defendant unlawfully keeps him out of possession." At page 378 of the same book, a form for a complaint in such a case is prescribed by the General Assembly; and at page 373, it is enacted, that "no pleading shall be deemed invalid for want of form, if it contain the substance required by law." This complaint contains all that is required by law, and shows a good title in the plaintiff, Margaret.

The judgment is reversed, at the costs of the appellees, with instructions to the court below to overrule the demurrer to the complaint, and for further proceedings.

E. H. Davis and *C. Wright*, for appellants.

B. F. Davis and *B. F. Love*, for appellees.

CARR v. ELLIS ET AL.

REPLEVIN.—*Title to Property.—Suit on Bond.*—Where property has been replevied from under a levy by virtue of an execution, and on the trial there has been a finding for the defendant on the issue of title to the property, and a judgment of return has been rendered, the plaintiff cannot afterward defend a suit on the bond, for a failure to deliver the property, by asserting a new title to the property, acquired after the bond in replevin was given and before judgment for a return.

APPEAL from the Henry Circuit Court.

BUSKIRK, J.—The facts necessary to a proper understanding of the question in the case, are these:

James Kinsey held a judgment against James J. Hamilton, in the Henry Circuit Court, for about three hundred dollars. On the 16th day of April, 1867, an execution was issued, in.

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due form of law, upon the said judgment, and was placed in the hands of the appellant, who was the duly elected and acting sheriff of the said county of Henry, who by virtue thereof, on the said day, levied on a cow as the property of the said judgment defendant. Ellis claimed to be the owner of the said cow by purchase of the said Hamilton on the 13th day of April, 1867. Ellis commenced an action of replevin for said cow and executed a bond for the due prosecution of said action, with the other appellees as his securities, and the cow was delivered to him. The action of replevin was tried, and resulted in a finding that the cow levied on and in dispute was the property of Hamilton, and subject to be sold upon the said execution. 'There was a judgment for the return of the said cow. Ellis failed to deliver the cow to the appellant. The appellant brought an action on the said replevin bond. The appellees answered in two paragraphs. The first in denial. The second paragraph was as follows:

"The defendants, for further answer herein, say that they admit the execution of the replevin bond sued on, but they say that the cow mentioned in the said bond was formerly the property of one James J. Hamilton, of said county of Henry, and was owned by the said Hamilton on the — day of April, 1867; and they aver that a tax lien had attached to the said property for taxes then due and unpaid, from and by the said Hamilton; and they aver that the said Hamilton removed from the said county in April, 1867, and left no other property in said county, to and upon which a tax lien had attached; and they further aver that the treasurer of said county levied his warrant and execution upon said cow, and advertised and sold said cow according to law, to pay the tax of the said Hamilton, then being delinquent on his, the treasurer's, duplicate; and that J. W. Ellis, as the highest bidder, bought said cow at said tax sale of the treasurer, at and for the price of thirty dollars, on the 8th day of June, 1867; and the defendants aver that said levy and sale by the said treasurer was after the bond sued on

was executed, and before the final judgment was rendered, mentioned in the complaint. Therefore, the defendants say that J. W. Ellis, the principal in said bond, is the real owner of said cow at this time, and not legally bound to make return thereof; and they ask judgment."

The appellant demurred to the second paragraph of the answer. The demurrer was overruled, and the appellant excepted. The cause was, by the agreement of the parties, submitted to the court for trial, and resulted in a finding for the appellees. The court overruled a motion for a new trial, and the appellant excepted.

The appellant has assigned for error the overruling the demurrer to the second paragraph of the answer and the motion for a new trial.

The first question presented for our decision is, whether the facts alleged in the second paragraph of the answer constituted a bar to the action on the replevin bond?

Ellis, on the 17th day of April, 1867, commenced his action of replevin for the cow in dispute, executed the bond sued on, and obtained the possession of the cow. In his complaint and affidavit he averred that he was then the owner of the cow, and entitled to the immediate possession thereof. This allegation was put in issue. The issue thus formed was tried, and resulted in a finding that Ellis was not the owner of the cow, but that she belonged to Hamilton, and was subject to sale upon the execution in the hands of the sheriff, who is the appellant here. There was judgment on the finding, and an order for the return of the cow.

Ellis failed to make return, and the sheriff brought this action on the bond, and Ellis pleads in bar of this action that he acquired the title to the cow after the commencement, but before the trial, of the action, by purchase at a tax sale, on a lien that existed prior to the commencement of the action of replevin.

The real issue that was involved in the trial of the action of replevin was, whether the plaintiff was the owner of and entitled to the immediate possession of the cow at the time

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when the action was commenced, and if he was then the owner and entitled to the possession of the property, he is not liable on his bond.

That issue was tried and decided against the plaintiff in that action. There was an order for the return of the property. It was not returned. The condition of the bond was as follows: "Now, if said J. W. Ellis shall prosecute said complaint to effect, and return said property, if return be awarded to said Robert B. Carr, and pay all costs and damages adjudged against him in said action, then said obligation to be void."

The refusal of Ellis to return the property to Carr, in pursuance of the award of the court, constituted a breach of the condition of the bond, and entitled the appellant to his action thereon.

It was held by this court, in *Wallace v. Clark*, 7 Blackf. 298, that "when the right of property is put in issue and decided on, it is then *res adjudicata*, and cannot, on general principles, be again inquired into in a suit between the same parties."

In *Davis v. Crow*, 7 Blackf. 129, it was said by this court: "We think the two demurrers were correctly sustained. The third plea, that the property belonged to the plaintiff in replevin, was no answer to the action for the penalty of the bond, nor did it suit the breach of the condition subsequently assigned, that the plaintiff in replevin failed to prosecute his suit with effect, etc. *Sherry v. Foresman*, 6 Blackf. 56."

It was held by this court, in *Smith v. Lisher*, 23 Ind. 500, that where the title to property had been put in issue, in an action of replevin, and decided, the decision was final and conclusive between the parties, and could not again be raised and tried in an action on the replevin bond; and it was further held, that in an action on a replevin bond the defendants could not plead in bar of the action, or prove in mitigation of damages, that the property was the property of a stranger.

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It was said by this court, in *Denny v. Reynolds*, 24 Ind. 248, which was an action on a replevin bond, that "the only issues involved were, whether the property in controversy was owned by the Stantons, and if so, whether it was liable to execution at the time the writ came into the hands of the sheriff. The finding of the court involved a decision of these issues, and the judgment rendered was, therefore, conclusive upon the appellant. The answer, in the case under consideration, attempts to present the same issue as matter of defence to the action upon the bond. This cannot be done."

We regard the above authorities as decisive of the question under consideration. We are quite clear that the matters pleaded in the second paragraph of the answer constituted no defence to the action, and that the court erred in overruling the demurrer. As to the doctrine of *res adjudicata*, see *Whitney v. Lehner*, 26 Ind. 503; *Abdil v. Abdil*, 33 Ind. 460.

The conclusion reached renders it unnecessary to determine anything as to the second error assigned.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, and sustain the demurrer to the second paragraph of the answer, and for further proceedings in accordance with this opinion.

J. Brown and *R. L. Polk*, for appellant.

W. F. Walker, for appellees.

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JURY.—*Communication to.*—While a jury was out deliberating upon a cause, the judge, at his room in a hotel, in the presence of counsel in the cause, prepared written directions for the jury in reference to the sealing of their verdict and separation after the same was made, which directions were then read aloud and sent to the jury without objection.

37	469
141	562
37	469
146	392

37	469
161	246

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Held, that the assent of counsel to the directions would be inferred.

ACTION.—*Cause of Action.*—Mere intentions, unexecuted, do not constitute: contract, a tort, or a crime, and are not the subject of legal or equitable judicial investigation.

TRUST.—*Parol Evidence.*—To establish a resulting trust in lands in favor of creditors, the terms of the agreement must be clearly and satisfactorily shown, and parol evidence to establish the same in opposition to the terms of a written conveyance should be received with caution.

SAME.—*Innocent Purchaser.*—A person who purchases real estate from one who bought at a sale on execution cannot be bound or affected by any agreement or trust, of which he had no notice or knowledge, between his vendor and the judgment debtor.

EVIDENCE.—*Immaterial Evidence.*—The admission of evidence that is only immaterial cannot affect a judgment which is correctly rendered upon the material evidence in the cause.

APPEAL from the Warren Circuit Court.

DOWNEY, J.—Suit by the appellants against the appellees. The facts as alleged in the complaint, which consists of two paragraphs, and amendments thereto, are, in substance, as follows: that Sloan was largely indebted to the plaintiffs and others, and was at the same time the owner of valuable real estate; that judgments were recovered by some of his creditors, other than these plaintiffs, in the United States Circuit Court, on one of which Daniel Yandes became replevin bail for Sloan. Executions were afterward issued on these judgments, by virtue of which the real estate of Sloan was sold, and Yandes became the purchaser at the marshal's sale, receiving deeds and causing them to be recorded; that Sloan induced persons not to bid on the lands, by which means they sold for less than their value; that he and his wife, afterward, in order to cheat and defraud the plaintiffs, conveyed to Yandes all their interest in said land and other lands; that Yandes was to reimburse himself for the amounts paid, with interest on the same, etc., and account to Sloan for the overplus; that, accordingly, Yandes did sell enough of the property to reimburse himself, except as to the sum of two thousand nine hundred dollars; that the unsold land was of the value of eighteen thousand six hundred dollars; that there were also certain judgments recovered by Yandes for amounts

due for purchase-money of real estate sold by him. It is further alleged that all of the unsold real estate, except sixty acres, was conveyed, and the judgments assigned by Yandes to one Sewell, who is a defendant; that if there was any consideration for the deed from Yandes to Sewell and the assignment of the judgments, it was furnished by Sloan; that Sewell had full notice of the facts, and accepted the deed, and was to hold the lands, etc., as Yandes had held them; that Sloan has all the time possessed, occupied, and used the lands. The plaintiffs also allege the recovery of judgment on their several claims, and pray that the deed from Yandes to Sewell, and the assignment of the notes, may be adjudged void and set aside, that the lands be declared subject to the payment of their claims, and for general relief.

Sewell answered, first, the general denial; second, that Sloan owed him seven thousand four hundred and seventy-seven dollars and ninety-two cents, and could not pay it; that it was rumored that he had an equitable interest in the lands in question, a right which Sloan did not at any time claim; that Sloan, in consideration of such indebtedness, conveyed the land and lots to him, in payment of his said indebtedness, which amount was the full value of said lands, after deducting the amount paid by him to Yandes from the value of such lands; that all of such property has been sold to third persons, without any notice to them of the claims of the plaintiffs. He denies all fraud, and claims that he was an innocent purchaser from Yandes in good faith; and he also denies that Sloan furnished the consideration paid by him to Yandes for the real estate.

Sloan and Yandes answered by a general denial of the allegations of the complaint. The plaintiffs replied by general denial to second paragraph of the answer of Sewell.

There was a trial by jury, and a general verdict for the defendants, and special findings as follows, in answer to interrogatories submitted by the plaintiffs:

1. Did the plaintiffs, Frederick Parmlee and Edward Parmlee, on the 28th day of November, 1853, recover the judgment

against Joseph L. Sloan, the defendant, as set forth in the complaint? Answer. Yes.

2. How much remains due to the said Federick and Edward Parmlee on said judgment at this time, including the principal and interest? Answer. Two hundred and five dollars and seventy-one cents.

3. When was the indebtedness, upon which said judgment was rendered, contracted? Answer. October, 1851.

4. Did the said John Hibbs, at the May term of the Fountain Common Pleas Court for 1864, recover the judgment as set forth in the plaintiffs' complaint? Answer. Yes.

5. What remains due to said Hibbs for principal and interest to this date? Answer. One thousand one hundred and thirty-eight dollars and seventeen cents.

6. When was the indebtedness, upon which said judgment was rendered, contracted? Answer. December 14th, 1857.

7. Did the plaintiff, Alvah Buckingham, at the January term of the common pleas court of Fountain county, for the year 1865, recover the judgment against Joseph L. Sloan, as set forth in plaintiffs' complaint? Answer. Yes.

8. What amount remains due said plaintiff on said judgment for principal, interest, and costs at this date? Answer. Nine thousand three hundred and forty-one dollars and fifty cents.

9. When was the indebtedness contracted, upon which said judgment was rendered? Answer. May 31st, 1854.

10. Did the plaintiff, Joseph Campbell, at the May term of the common pleas court of Fountain county for the year 1864, recover the judgment against the defendant, Sloan, as set forth in the plaintiffs' complaint? Answer. Yes.

11. What amount remains due the plaintiff for principal, interest, and costs at this date? Answer. Three hundred and fifty-three dollars and forty-seven cents.

12. When was the indebtedness contracted, upon which said judgment was rendered? Answer. January 29th, 1853.

13. Did the plaintiff, Isaac Orahod, at the May term of the Fountain Common Pleas Court for 1864, recover a judg-

ment against the defendant, Sloan, as set forth in the plaintiffs' complaint. Answer. Yes.

14. What amount remains due for principal and interest to the plaintiff at this date on said judgment? Answer. Three hundred and seventy-five dollars and twenty-two cents.

15. State when the indebtedness accrued, upon which said judgment was rendered. Answer. May 20th, 1855.

16. Did the State of Indiana, on the relation of William Lamb, auditor of Fountain county, recover a judgment, at the May term of the Fountain Circuit Court for the year 1852, against the defendant, Sloan, as set forth in the plaintiffs' complaint? Answer. Yes.

17. What amount remains due for principal and interest to the plaintiff at this date? Answer. Nine hundred and sixty-seven dollars and twenty-eight cents.

18. When was the indebtedness contracted, upon which the judgment was rendered? Answer. April, 1843.

22. Did William Martin, plaintiff, at the May term of the Fountain Common Pleas Court for 1864, recover the judgment against Joseph L. Sloan, as set forth in the plaintiffs' complaint? Answer. Yes.

23. When was the indebtedness, upon which such judgment was rendered, contracted, and what amount is now due? Answer. November 9th, 1853, and now due eight hundred and forty-nine dollars and sixteen cents.

24. Did the plaintiffs, Peter A. White and William Sheom, at the May term of the Fountain Circuit Court for 1853, recover the judgment against the defendant, Joseph L. Sloan, as set forth in the plaintiffs' complaint? Answer. Yes.

25. How much remains due to the said White and Sheom on said judgment at this date, including principal and interest? Answer. Three thousand seven hundred and seven dollars and fifty-one cents.

26. When was the indebtedness upon which said judgment was rendered contracted? Answer. November 5th, 1850.

27. Did Peter Neff, William Neff, and Peter R. Neff, at

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the May term of the Fountain Common Pleas Court for 1864, recover the judgment against the defendant, Joseph L. Sloan, as set forth in plaintiffs' complaint? Answer. Yes.

28. How much remains due the said Peter Neff, William Neff, and Peter R. Neff, at this date, on said judgment, including principal and interest? Answer. One thousand ninety-seven dollars and forty-five cents.

29. When was the indebtedness upon which such judgment was rendered contracted? Answer. January 25th, 1856.

30. Did the plaintiff, James Graham, at the April term of the Fountain Common Pleas Court for 1864, recover the judgment against the defendant, Joseph L. Sloan, as set forth in the plaintiffs' complaint? Answer. Yes.

31. How much remains due the said James Graham on said judgment at this date, including principal and interest? Answer. One thousand fourteen dollars and twenty-five cents.

32. When was the indebtedness upon which said judgment was rendered contracted? Answer. Four hundred and eight dollars, April 28th, 185-; seven hundred dollars, August 24th, 1848.

33. Did the said Nicholas Graham, John L. Patterson, and Flavius J. Phillips recover the judgment against the defendant, Joseph L. Sloan, in the United States Circuit Court for the district of Indiana, as set forth in the plaintiffs' complaint? Answer. Yes.

34. Did the said John R. Neff, Kirkbridge Yardly, and William R. Neff recover the judgment against the said Joseph L. Sloan in the United States Circuit Court for the district of Indiana, as set forth in the plaintiffs' complaint? (No answer.)

35. Did the marshal of the United States Circuit Court for the district of Indiana sell, under execution issued upon the judgments referred to in the two preceding questions, and as set forth in the complaint of plaintiffs, the property of defendant Sloan, described in the complaint, and alleged to

have been so sold by him on the 5th day of September, 1854? Answer. Yes.

36. For what amount did said property sell at said marshal's sale? Answer. One thousand six hundred and one dollars.

37. Who was the purchaser at said marshal's sale? Answer. D. Yandes.

38. What was the value of the said property so sold at marshal's sale at the time the same was sold? Answer. Thirteen thousand six hundred and fifty dollars.

39. Did Joseph L. Sloan and wife, on the thirteenth day of September, 1854, execute to Daniel Yandes a deed in fee simple for the lands so sold at the said marshal's sale on the 5th day of September, 1854? Answer. Yes.

40. What is the consideration expressed in said last named deed? Answer. One hundred dollars.

41. What was the real consideration of said deed from Sloan and wife to Yandes? Answer. Nothing.

42. Did the defendant, Joseph L. Sloan, remain in the possession, occupancy, and ostensible ownership of said lands so sold at marshal's sale, receiving the rents, issues, and profits thereof for his own benefit and use, from the date of said sale up to the 30th day of June, 1859, with the exception of so much thereof as was sold during the time intervening from the date of said sale to the said 30th day of June, 1859, by David Rawles, agent and attorney in fact for said Daniel Yandes? Answer. In possession, but not receiving all the rents.

43. What amount was realized by Daniel Yandes from the sale of said lands purchased by him at said marshal's sale, up to the 30th day of June, 1859? Answer. Eleven thousand five hundred and twenty-five dollars.

44. Did said Yandes appropriate the means realized by him from the sales of said lands purchased by him at marshal's sale, or any part thereof, for the benefit of defendant Sloan; and if so, for what amount, and for what purpose? Answer. No.

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45. Did said Daniel Yandes appropriate the balance of the moneys realized by him from his sales of said lands purchased by him at said marshal's sale, to the payment of his own advances and expenses, together with interest thereon; or in what way did he appropriate it? Answer. Yes.

46. Has the defendant, Joseph L. Sloan, occupied, controlled, and been in possession of the said sixty acres off the west side of the south-west quarter of section 36, town 20, range 9, west, sold at the said marshal's sale and purchased by said Yandes, from the date of said marshal's sale to the present time? Answer. No.

47. What improvements has the defendant, Sloan, placed upon said last named tract of land since the date of said marshal's sale, and what is the value thereof? Answer. House, worth twelve hundred dollars.

48. Was it understood or agreed by and between defendants, Sloan, and said Daniel Yandes, at the time of the said marshal's sale, or at the date of the deed by Sloan and wife to said Daniel Yandes, on the said 5th day of September, 1854, that the said lands then purchased at said sale by said Yandes were to be held by said Yandes, in trust for the benefit of said Sloan, or his wife or children, subject to the payment of the judgments upon which said lands were sold, and the charges, expenses, and outlays of said Yandes, together with ten per cent. interest thereon, and all prior liens? Answer. No.

49. Did Daniel Yandes, on the 30th day of June, 1859, convey to William C. B. Sewell, defendant, the lands so purchased by him at marshal's sale, and so conveyed by Sloan and wife to said Yandes, except those sold by Rawles as his agent, and except, also, the sixty acres off the west side of the south-west quarter of section 36, town 20, range 9? Answer. Yes.

50. What was the value of the property so conveyed at that time? Answer. Four thousand and forty-seven dollars.

51. What notes, judgments, and other securities did Yandes, at or about the time he conveyed said lands to Sewell, as-

sign to said Sewell, which were the proceeds of the sales of the lands of said Sloan, so purchased by Yandes at said marshal's sale? Answer. Judgments and notes to the amount of three thousand seven hundred dollars, or thereabout; no names or number recollected.

52. What consideration did Sewell give for the conveyance of said lands and the assignment of said notes, judgments, and other securities to Sewell? Answer. Three thousand one hundred and eighteen dollars.

53. Was the defendant, Sloan, in possession of the property in controversy, appropriating the rents and profits to his own use, when Sewell received his conveyance from Yandes? Answer. In possession, but not receiving all the rents.

54. Did Sewell, at the time, know of such possession? Answer. Yes.

55. Has Sloan, ever since the execution of said deed from Yandes to Sewell, continued to possess and control the property thereby conveyed, and also the sixty acres off the west side of the south-west quarter of said section 36, town 20, range 9? Answer. No.

56. Did Sewell receive the deed from Yandes, with an understanding or agreement with Yandes that he, Sewell, should hold the property so conveyed by Yandes to him, in trust for Sloan or his family? Answer. No.

57. Did Sewell receive the deed from Yandes in pursuance of a corrupt agreement or understanding between him and Sloan to secure the said property thereby conveyed in the hands of Sewell, so that the same could not be reached by the then existing creditors of Sloan? Answer. No.

58. Was the deed executed by Sloan and wife to Sewell, dated the 13th of March, 1852, whereby they conveyed to Sewell sixty acres off the west side of the south-west quarter of section 36, town 20, range 9, executed by Sloan and received by Sewell with the purpose and object of secreting the property therein described, so that the same could not be reached by execution, and thereby to defraud the creditors of Sloan? Answer. No.

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59. Was the deed executed by defendant Sloan to the defendant, Sewell, dated August 2d, 1864, whereby he conveyed to Sewell the lands therein described, executed in pursuance of a preconcerted design or agreement between Sloan and Sewell, to secrete said lands, so that the same could not be subjected to the debts of the plaintiff, and to hinder them in the collection of their debts? Answer. No.

The following interrogatories were propounded to, and answered by, the jury at the instance of the defendant Sewell:

1. Did Joseph Sloan, at or before the marshal's sale of his property, September 5th, 1854, induce any person not to bid at such sale, by promises of reward to them, or by other means? Answer. Did not.

2. Did Daniel Yandes know at the time of such sale and purchase by himself that any person or persons had been induced not to bid at such sale by said defendant Sloan? Answer. No.

3. Did William C. B. Sewell, defendant, know, at the time of the conveyance by Yandes to him, June 30th, 1854, that defendant Sloan had, by any means, induced persons not to bid on his property at the marshal's sale of the same, September 5th, 1854? Answer. No.

4. Was there any agreement whatever between Joseph L. Sloan and Daniel Yandes at or before the marshal's sale of Sloan's property of September 5th, 1854, regarding said property then sold; and, if so, what were the terms of such agreement? Answer. No.

5. Was there any agreement between Joseph L. Sloan and Daniel Yandes at or before the marshal's sale of Sloan's property, September 5th, 1854, that the said Daniel Yandes was to hold the surplus of the property remaining after reimbursing himself, for the use and benefit of Sloan, and to be accounted for by said Yandes to said Sloan? Answer. No.

6. Had defendant Sewell, at the time of the sale and conveyance by Yandes to him, June 30th, 1859, any notice that Yandes then held said property in trust for Joseph L. Sloan under any agreement whatever? Answer. No.

7. Did Joseph L. Sloan furnish any part of the consideration paid by Sewell to Yandes for said property? Answer. No.

8. Did defendant Sewell receive and accept such conveyance from Yandes under an agreement with either Sloan or Yandes to hold the same in trust for, or for the use of Sloan? Answer. No.

9. What was about the cash value of the real estate of Joseph L. Sloan sold at marshal's sale, September 5th, 1854, and to which the wife of Sloan afterward relinquished her right of dower? Answer. Thirteen thousand six hundred and fifty dollars.

10. What was about its cash value at that time, subject to the right of dower of Mary Jane Sloan, then the wife of Joseph L. Sloan? Answer. Nine thousand one hundred dollars.

11. What amount was paid by David Rawles from proceeds of sales of the Sloan property to Daniel Yandes, up to June 30th, 1859? Answer. Eleven thousand five hundred and twenty-five dollars.

12. What amount was paid by defendant Sewell for the conveyance made by Yandes to him, said Sewell, June 30th, 1859? Answer. Three thousand one hundred and eighteen dollars.

13. About what amount was Sloan indebted to Sewell on the 2d of August, 1864, when the quitclaim deed was made by Sloan to Sewell of the lands and lots in controversy? Answer. Seven thousand four hundred and seventy-seven dollars and ninety-two cents.

14. Was there any combination and confederation between Sloan and Yandes at or before the marshal's sale, September 5th, 1854, to cheat and defraud the creditors of Sloan, the plaintiffs in this suit? Answer. No.

15. Did Sewell, the defendant, at or before the date of his purchase from Yandes, know of any combination between Yandes and Sloan to cheat and defraud any of the creditors of Sloan? Answer. No.

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16. Did Sloan, Yandes, and Sewell combine and confederate together at or before the marshal's sale, September 5th, 1854, or at any other time, to cheat and defraud any of the creditors of Sloan? Answer. No.

17. Was there any agreement in writing between Sewell and Sloan or Sewell and Yandes of the terms of any trust regarding said property? Answer. No.

18. What amount was paid by defendant Sewell for the sixty-acre tract of land in section 36, sold by Sloan to Sewell? Answer. One thousand eight hundred dollars.

19. What was the date of the deed made by Sloan and wife to Sewell for that tract of land? Answer. March 13th, 1852.

20. What was the date of the recording of same deed? Answer. April 22d, 1852.

21. What was the date of the purchase of the same land by Sewell at the sinking fund sale of lands in 1852? and what was the date of the mortgage on which the same was sold to Sewell? Answer. Date of purchase, 1852; date of mortgage, 1844.

A new trial was asked by the appellants for the following reasons: first, because the court permitted the jury, after they agreed upon their verdict, to separate, and meet, and deliver their verdict at the meeting of the court the next morning; second, the court misdirected the jury in its charges given at the instance of the defendants, and improperly refused and modified those asked by the plaintiffs; third, the verdict of the jury is contrary to law; fourth, the verdict of the jury is contrary to the evidence; fifth, the improper admission of the deed from Sloan and wife to Sewell as evidence for the defendants.

This motion was overruled, and judgment rendered. The evidence and instructions are in the record by bill of exceptions.

The only error properly assigned is, that the court wrongfully refused to grant a new trial.

With reference to the first point, the facts are that the

jury was sent out to consult of their verdict at about four o'clock on Saturday afternoon of the first week of the term. After waiting for them to agree until eleven or twelve o'clock at night, the judge sent to the jury, by their bailiff, written directions, that when they agreed upon a verdict, they should seal it up, and leave it in the care of the foreman; that they should not communicate to any one what verdict they had agreed on, and meet in court on Monday morning. This note to the jury was written at the hotel where the judge was boarding, in the presence of counsel for the defendants and one of the counsel for the plaintiffs, was read aloud, and sent off to the jury without any objection from the counsel of the plaintiffs, who was present, and with the understanding on the part of the judge that he was assenting to the arrangement. The jury agreed on their verdict at about half past two o'clock on Sunday morning, sealed up their verdict, separated, and on Monday morning, at the meeting of the court, were present and delivered their verdict in open court. We think that if it was necessary to have the consent of counsel to authorize the court to permit the jury thus to separate, we ought to infer the assent of counsel thereto. See on the subject of separation of the jury by order of the court. *Harter v. Seaman*, 3 Blackf. 27; *Bosley v. Farquar*, 2 Blackf. 61, and note 3.

The first instruction to which exception was taken, and which is referred to in the brief of counsel, is as follows: "That secret intentions of parties, or declarations of intention and purposes of such parties to strangers or others, cannot be enforced as duties or obligations, or become the subject-matter of legal or equitable judicial investigation."

Mr. Yandes denied most positively in his testimony that there was any agreement by which he was to hold the land, or the overplus after reimbursing himself, for the benefit of Sloan. But, if it could be done, he intended to save something for Sewell, to whom Sloan was indebted.

If the proposition contained in this charge was intended to

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apply to that testimony, and to inform the jury that such mere intentions on the part of Yandes, whether they remained secret or were declared to strangers or others, could not be legally recognized as circumstances affecting the case, we see no objection to it. If it was not intended to meet that view of the case, we do not see that it had any application to the case. Mere intentions unexecuted do not constitute either a contract, a tort, or a crime, and in this view they are not the subjects of legal or equitable judicial investigation.

The second instruction to which our attention is called is as follows: "To establish a resulting trust in lands in favor of creditors, the terms of the agreement must be clearly and satisfactorily shown, and parol evidence to establish the same, in opposition to the terms of a written conveyance, should be received with caution in all cases in which such evidence is admissible."

The deed to Yandes from the United States marshal and also the deed from Sloan and wife to him were absolute on the face of them; but it was alleged, and sought to be shown by the plaintiffs, that there was a contract or agreement between Yandes and Sloan, by which Yandes was to hold the lands in trust for Sloan, or to pay to him any overplus which might remain after the repayment to Yandes of the amounts for which he was liable as the surety of Sloan, etc. We think it was proper for the court to say to the jury that the terms of the agreement thus alleged must be clearly and satisfactorily shown, and that parol evidence to establish the same should be received with caution. Such, in effect, is the rule recognized in the following cases: *Fausler v. Jones*, 7 Ind. 277; *Blair v. Bass*, 4 Blackf. 539. The right to prove a trust by parol is exceptional. The general rule is, that trusts concerning lands must be created in writing, signed by the party creating the same, or by his attorney authorized in writing. 1 G. & H. 651, sec. 1. There is an exception to this rule of such trusts as arise by implication of law. Hence the admissibility of parol evidence to show such a trust. See *Irwin v. Ivers*, 7 Ind. 308.

The third charge objected to by the appellants is this: "That if the jury believed from the evidence that such arrangement was made between Yandes and Sloan before or at the marshal's sale of Sloan's property on the 5th of September, 1854, as is set forth in plaintiffs' complaint, still Sewell cannot be bound or affected by it, unless the jury also believe from the evidence that Sewell had knowledge of, or notice of, such agreement, at or before the conveyance to him by Yandes."

This charge was correct. Sewell could not be affected by a trust of which he had no notice. But as the jury so fully settled the question by their findings that there was no such agreement between Yandes and Sloan, it would seem to be immaterial whether this charge was correct or not.

The fourth instruction is as follows: "If the jury believe from the evidence that the deed of Sloan and wife to Daniel Yandes, of September 13th, 1854, and the two marshal's deeds to Yandes, were duly recorded before the conveyance by Yandes to Sewell, June 30th, 1859, the possession or occupation by Sloan of a part of the property thus conveyed to Yandes would not be constructive notice to Sewell of a trust in Yandes for the use and benefit of Sloan, even if they should find from the evidence, that such agreement between Sloan and Yandes to hold in trust, as is set forth in the plaintiffs' complaint, was proved."

As the jury found that there was no trust as between Yandes and Sloan, the possession of the land or part of it by Sloan could not be notice to Sewell, or to any one else, of such a trust. The charge was inapplicable to the facts as found by the jury, and could have done the plaintiff no harm, conceding that it was incorrect. But we need not decide whether it was or was not correct.

The fifth reason assigned for a new trial is, that the court improperly admitted the deed from Sloan and wife to Sewell for the sixty acres of land in section 36, dated March 13th, 1852.

As we understand the facts of the case, this deed was not

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for any of the lands involved in the controversy in this case. If so, then it was only immaterial, and its admission cannot affect a judgment which is correctly rendered upon the material evidence in the case.

The remaining reasons for a new trial are, that the verdict is contrary to law and to the evidence. The evidence fully justified the verdict of the jury, and we have gone to the trouble of setting out the numerous interrogatories submitted by the parties to the jury, and their answers thereto, in order to show how almost every material allegation of the complaint is negatived by the findings of the jury.

On another trial of this case before that which resulted in the verdict which we have set out, there was a general verdict for the defendants, and the court, without reason, and perhaps improperly, granted a new trial as a matter of right. We think that there is no good reason for further litigating the matters involved.

The judgment is affirmed, with costs.*

J. Ristine, J. W. Nichol, Z. Baird, and T. F. Davidson, for appellants.

W. H. Mallory and J. M. Butler, for appellees.

*Petition for a rehearing overruled.

GAVISK ET AL. v. MCKEEVER.

APPEAL BOND.—*Breach.*—*Defect.*—Where a bond for an appeal to the Supreme Court is given, and the appeal is not perfected in the Supreme Court, an action for that breach of the bond may be sustained, although that condition, required by the statute, be not contained on the face of the bond.

APPEAL from the Vanderburg Common Pleas.

PETTIT, J.—This suit was brought by the appellee against the appellants, and we copy the complaint in full: "The said Thomas McKeever, plaintiff, complains of the said Timothy J. Gavisk and Patrick Doyle, defendants, and says,

that at the May term of this court, 1869, the plaintiff herein brought a suit against the said defendant, Timothy J. Gavisk, and that when the said cause came on for trial, this court rendered a judgment against the said defendant, Timothy J. Gavisk; which judgment is in words and figures as follows, to wit: *Thomas McKeever v. Timothy J. Gavisk*.—Now come the parties, and it appearing to the court from the evidence, that the defendant has the sum of fourteen hundred dollars in his possession, together with wearing apparel in the county, which he unjustly refuses to apply to the payment of the judgment on which these proceedings were instituted; and it further appearing to the court that the said defendant was about to leave the State of Indiana, without leaving any property therein subject to execution. It is therefore considered and adjudged by the court, that the said defendant pay into court, instant, the sum of one hundred and seventy-six dollars and ten cents, the amount of the judgment of the plaintiff, Thomas McKeever, against said defendant, Timothy J. Gavisk, the same on which these proceedings are instituted; and the further sum of twenty dollars and thirty-two cents, the costs in said judgment, and also the costs of this proceeding; or that, with good and sufficient surety, he stay said judgment instant. It is further ordered and considered, that the said Timothy J. Gavisk remain in the custody of the sheriff until the said judgment be paid, or the same be stayed. From which finding and judgment the defendant excepts, and appeals to the Supreme Court, and files his bond in the sum of three hundred dollars, with Patrick Doyle as his surety; which bond is approved by the court, and the appeal granted, and the said defendant is given thirty days to file his bill of exceptions; and the defendant is hereby discharged from custody. And the said defendant did then and there file his said appeal bond, which is in the words and figures as follows, to wit:

“ ‘*Thomas McKeever v. Timothy J. Gavisk*.—In the Vanderburg Court of Common Pleas, May term, 1869.—We, Timothy J. Gavisk, as principal, and Patrick Doyle, as surety,

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undertake and bind ourselves to the plaintiff, in the sum of three hundred dollars, that said defendant will satisfy and perform the judgment which shall be rendered in the Supreme Court of Indiana, in the appeal to said court of the above entitled cause, together with all costs which shall be adjudged against said defendant upon said appeal. May 21st, 1869.

"TIMOTHY J. GAVISK,

"PATRICK DOYLE."

"But the plaintiff says that the defendants have wholly appeal; he has wholly failed to make options, and utterly failed and neglected; and that thereby said judgment void and effect, and that the said sum of plaintiff from the defendants here failed to pay the same, or any part of this plaintiff in the sum of three hundred dollars. Wherefore, he demands judgment fifty dollars, and all other proper relief."

As to this complaint, by each of the parties, it is not a question of fact, but of law, and we want of sufficient facts, which was the only question in the case is the sufficiency of the complaint. We hold that the complaint was

defective, and that no judgment rendered in the appeal prosecuted to this court; and that the appeal as prayed and prosecuted, and the purpose the bond was given, is the

defective. H. 271, sec. 555, requires that one among others, shall be, "that he will satisfy the same." This condition is not in this complaint, but this defect may be cured by filing a bond (2 G. & H. 333, sec. 790); and it is when the bond is filed with and the complaint, and the defect is palpable from

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inspection, it is a sufficient suggestion of the defect; *Cook v. The State, ex rel. Patterson*, 13 Ind. 154; and we approve of the ruling in that case.

The judgment is affirmed, at the costs of the appellants.

A. Dyer, for appellants.

J. M. Shackelford, for appellee.

UNVERSAW v. MYERS.

REAL ESTATE, RECOVERY OF.—*Pleading.—Defective Description.*—Where the complaint in an action to recover the possession of real estate described the land as “six — of lot number five,” etc., and the finding was “six acres of lot number five,” etc.;

Held, that the finding did not cure the defect in the description of the premises in the complaint.

APPEAL from the Marion Circuit Court.

DOWNEY, J.—The appellee sued the appellant, alleging in the first paragraph of his complaint, that he was the owner in fee simple, and entitled to the possession of six— of lot number five, in Daniel Yandes’ sub-division of the Carson farm, lying south of and adjoining the two acres heretofore sold to Frederick Janeike, being two acres off the north end of said lot, situated in Marion county, Indiana; that the defendant then held possession of said land without right, and for one year past had unlawfully kept the plaintiff out of possession; wherefore, etc.

In the second paragraph he alleged, that on or about the 15th day of April, 1868, at the county of Marion, Indiana, the defendant, without leave, unlawfully entered upon the space and strip of ten feet in width off the south side of a parcel of six acres of lot number five, in Daniel Yandes’ sub-division of the Carson farm, as described in the first paragraph of the complaint, of which the plaintiff was then

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owner, and dug a great number of holes therein, by which plaintiff was damaged to the amount of two hundred dollars, for which he demanded judgment.

In the third paragraph he alleged that he was the owner of the strip of ten — wide off the south side of the six-acre parcel of ground described in paragraph two, to which description he refers and adopts as part of this paragraph; and said defendant, Unversaw, sets up a claim to the ownership of or some interest in the same; wherefore, etc.

Answer, the general denial.

There was a trial by the court, and finding that the plaintiff was the owner and entitled to the possession of the real estate in the complaint described, to wit, "six acres of lot number five, in Daniel Yandes' sub-division of the Carson farm, in the county of Marion, and State of Indiana, to wit, commencing at a point eight rods south of the north-east corner of said lot number five, thence south twenty-four rods, thence west, parallel with the north boundary line of said lot number five, forty rods, thence north, parallel with said east line, twenty-four rods, thence east, parallel with said south line, forty rods, to the place of beginning; and the court assesses the plaintiff's damages for the detention thereof at ten dollars." The defendant moved the court to grant him a new trial, for the reasons, that the finding of the court was contrary to law, was not sustained by the evidence, and was contrary thereto. This motion the court overruled, and the defendant excepted, and, within the time allowed by the court, filed his bill of exceptions containing the evidence.

The errors assigned call in question the sufficiency of the several paragraphs of the complaint, and the correctness of the ruling of the court in refusing to grant a new trial.

The first paragraph is the only one on which the finding and judgment of the court could have been based. It is the only one which seeks the recovery of possession of real property. The second is in trespass *q. c. f.*, and the third is to quiet title. We think the description of the land sought

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to be recovered in the first paragraph is wholly insufficient. There is a blank in it in which we might insert acres, roods, perches, or feet, but we cannot know which was intended.

It is expressly provided by the code, that in the action to recover real property, "the plaintiff in his complaint shall state that he is entitled to the possession of the premises, particularly describing them," etc. 2 G. & H. 282, sec. 595.

The foundation upon which the recovery rests being thus insufficient, we cannot sustain the judgment, nor need we examine any other question.

The judgment is reversed, with costs, and the cause remanded.*

B. K. Elliot, for appellant.

S. E. Perkins and *S. E. Perkins, Jr.*, for appellee.

*Petition for a rehearing overruled.

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THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY v. THE STATE, EX REL. THE CITY OF LAWRENCEBURG.

CITY.—*Railroad Crossing.—Mandate.*—A mandate will lie to require a railroad company having its track upon, along, or across the streets and alleys of a city, to so build and erect the same, and level and grade the said streets and alleys, their full width, as to render the use of the streets and alleys and the crossing of the track convenient for the public.

PRACTICE.—*Striking Out.*—If a paragraph of an answer is properly struck out on motion, as amounting to the general denial, which has been filed, this ruling cannot be made erroneous by a subsequent withdrawal of the general denial.

APPEAL from the Dearborn Common Pleas.

BUSKIRK, J.—This was a complaint and motion, in the name of the State, on the relation of the city of Lawrenceburg, against the Indianapolis and Cincinnati Railroad Company, for a writ of mandate.

It is alleged by the relatrix, in her complaint and motion,

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that in the year 1854, etc., the said railroad company, formerly named and styled "The Lawrenceburg and Upper Mississippi Railroad Company," built and constructed in and through the city of Lawrenceburg, aforesaid, and in, upon, and across certain public streets and alleys in said city, then, and for more than twenty years previous thereto, uninterruptedly laid out, established and in public use, in and by said city, and by the inhabitants thereof, and by the public generally, and ever since and still in such public use, as aforesaid, an iron railroad, with side-tracks and switches; that such railroad and side-tracks and switches were and are built in, upon, and across the following public streets in said city, namely: Shipping street, Third street, High street, and First street, in that part of the said city of Lawrenceburg commonly called New Lawrenceburg; and Partition Lane, Maple street, High street, Charlotte street, Mary street, Vine street, Walnut street, Short street, Elm Row, and New street; and all the public alleys in said city running between such streets, in the original town of Lawrenceburg, in the said city of Lawrenceburg; that in the course of the building and construction of such railroad and side-tracks and switches, the defendant built and erected high embankments of earth and other substances, in, upon, and across such streets and alleys, and laid iron rails in and upon the same; and that then and there and thereby the passage and repassage of persons and vehicles in, upon, over, and across such streets and alleys became, and was, and still is either wholly obstructed and made impracticable, or made very difficult and inconvenient. And then she avers that, upon the building and erection of such embankments in, upon, and across such streets and alleys, it became, and was, and yet is the legal duty of the said railroad company to so build and erect the same, and level and grade the same, as to allow free and unobstructed passage and repassage in, upon, and across such streets and alleys, by properly grading the same to a corresponding, proper, and convenient grade with such embankments, and by making the iron rails laid thereon flush with

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such streets and alleys, when so graded; by grading and levelling such streets and alleys, in and upon which such embankment was and is built and constructed, the full length and width thereof, and by grading such streets and alleys across which such embankments and the railroads and side-tracks and switches thereon are built and constructed and erected, the full width thereof, with a convenient grade for crossing; but that the defendant has hitherto wholly failed and neglected, although a reasonable time since the erection of said embankments and the building and construction of such railroad thereon has long since elapsed, and although the defendant has heretofore been frequently notified and requested by the said relatrix to so properly level and grade such streets and alleys, and still refuses so to do; and the said streets and alleys are either wholly obstructed and impassable, or are very difficult and inconvenient for passage and repassage in, upon, and across the same. It is then further alleged in the complaint that the defendant constructed her said railroad in and through said city of Lawrenceburg under and by virtue of a certain ordinance of the common council of said city of Lawrenceburg, passed and adopted, at the instance of the defendant, on the 25th day of September, 1852, the first and second sections of said ordinance, which only are material, read as follows:

“Sec. 1. Be it ordained by the mayor and select council of the city of Lawrenceburg, that it shall be lawful for the Lawrenceburg and Upper Mississippi Railroad Company to locate and construct their said road with one or more tracks through the city of Lawrenceburg to the depot ground, and wharf owned by said company on the upper side of Short street, and wherever the same be necessary for the convenient dispatch of business, and to connect with other railroads which may be constructed within said city, or to connect with such depot grounds, wharf, or workshops; to construct said road, with such side-tracks, switches or turnouts as may be necessary, in, over, upon, or across any street, alley, or other public grounds, within said city,

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and the same to maintain and keep up during the existence of the charter of said company for the use of the same.

"Sec. 2. That it shall be the duty of said company, whenever their work shall be laid upon or across any such public street, alley, or ground, to make and keep up all necessary crossing places for the convenient passing over said road with horses, teams, etc.; and where the grade of said road shall be higher than such street, alley, or public ground, the said company shall fill up on each side of their said road to form a convenient passage over the same. Said company shall also build such culverts under or over their said road, as may be necessary for the drainage or sewerage of said city, as may be directed by the marshal of said city."

It is further averred in the complaint, that in order to make a good and sufficient crossing across said railroad, sidetracks, and switches, for passage and repassage in and upon the same, it is necessary that each and every of the said streets and alleys crossing the same be filled up and graded, the full width of such streets and alleys, to a grade not exceeding three degrees. Whereupon the relatrix moved and prayed the court for a writ of mandate, commanding and compelling the defendant forthwith, without any delay, to so construct, build, level, and grade the said embankments, and the said railroad, sidetracks, and switches, so as to make them level and flush with such streets and alleys in and upon which the same are built, erected, and constructed, and to fill up on the sides of such embankments, railroad, sidetracks, and switches, and at street and alley crossings, so as to make the grade of such streets and alleys, across which such embankments and the said railroad, sidetracks, and switches built thereon, are built, erected, and constructed, the whole width of such streets and alleys, of an easy and convenient grade for crossing such embankments, and the railroad, sidetracks, and switches built thereon, and at such crossings, so as to make the rails laid in, upon, and across such streets and alleys (excepting the alley next southeast of and run-

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ning parallel with William street) level and flush with the same, so that the passage and repassage of vehicles and persons in, upon, and across the same, may not be obstructed and prevented, or be impracticable or difficult, but so that the same be passable and convenient for all proper uses, and for all such other and further orders and judgment in the premises as may be right and just.

The complaint was verified by affidavit. The railroad company waived the issuing of an alternative writ of mandate, and proceeded to plead. And she first demurred to the complaint, on the ground that the same does not state facts sufficient to constitute a cause of action. The question arising upon the demurrer to the complaint is, whether, upon the facts alleged in the complaint, a writ of mandate will lie at all.

The relatrix maintains that a writ of mandate will lie against the railroad company, because she has no other adequate remedy provided by law against the company. The railroad company is not liable to indictment or information under our statute laws for obstructing public highways, nor, as corollary, is the company liable to a penalty under a penal ordinance of the city for obstructing such streets and alleys. *The State v. The President and Directors of the Ohio and Mississippi Railroad Company*, 23 Ind. 362. But admitting, for the sake of the argument, that under the late general law for the incorporation of cities, authorizing a summons to issue against the company for the violation of a city ordinance, the railroad company might be proceeded against for obstructing public streets and alleys in the city, and a penalty be recovered from her; yet this would not be an adequate remedy, as the evil complained of would not be obviated, but still remain as before. The city, as such, can have no action for damages by assessment or otherwise, such action will only lie in favor of individuals for special damages. The common council has exclusive power over the streets, highways, alleys, etc., within the city; and, as a necessary consequence, it is her duty to keep and maintain

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such streets and alleys unobstructed; *The City of Logansport v. Wright*, 25 Ind. 512; and no matter by whom the obstruction may be placed in the street or alley, the city is primarily liable to an individual that may sustain damage by reason of such obstruction; 1 Redf. Railways (3d ed.), 538-543; and although the railroad company may be liable too, and although the city might have an action, after having paid damages and costs, against the railroad company for reimbursement, this would subject the city to endless litigation, but the evil complained of would still remain.

Can it be said, then, that this would be an adequate remedy? It would seem to us not. Or shall it be said that it is the duty of the city to fill up and grade the streets and alleys so as to make them convenient for passage, etc., at her own expense, in the first instance, and then be compelled to bring an action against the railroad company for reimbursement? If one have a right of action for a grievance against another, either for damages or for the specific performance of an act, it is certainly not an adequate remedy to him, to be compelled in the first instance to lay out one hundred dollars for the use of another, and then to have the right simply to recover back his money so laid out by him, and perhaps to get legal interest on his money. But the railroad company contends that she constructed her railroad under said ordinance, and that the ordinance is nothing but a contract between the city and the railroad company.

We are of the opinion that the common council of a city have no authority to make contracts for the sale or letting of any public street or any portion thereof. They may, it is true, grant an easement in the street to a railroad company, to use the street in common with the public; but they could not make a grant authorizing a railroad company to obstruct or to appropriate to her sole use any public street. Such authority would be *ultra vires*, and neither any owner of property in a city, nor a city herself, would be bound by any such grant. *Tate v. The Ohio and Mississippi Railroad Company*, 7 Ind. 479; *Protsman v. The Indianapolis and Cincinnati*

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Railroad Company, 9 Ind. 467. In the latter case, this very same ordinance was pleaded by the railroad company as a license, etc. But this ordinance is not a contract between the railroad company and the city, but simply a grant of the right of way upon certain conditions and duties subsequent, to be performed by the company. And the proper means by which a corporation may be compelled to perform a plain duty—and the duty is plain in this case—is by a writ of mandate. Public duties of corporations may be enforced by mandamus. 2 Redf. Railw. (3d ed.) 277.

The case of the *L. & N. A. Railroad Company v. The State, ex rel. McCarty*, 25 Ind. 177, deciding that a mandate will not lie where the statute has expressly provided another adequate remedy, cited by appellant's counsel, has no analogy to the case at bar. There an express remedy was provided by statute, while in the present case, no statutory provision for the remedy of the grievance complained of, and for the enforcement of the rights of the relatrix, other than a mandate against the railroad company, can be found. Mandamus being the only adequate remedy to enforce the specific performance of the company's duty in the premises, does it lie at all? Where the statute provides that railways "shall maintain and keep in repair all bridges, with their abutments, which they shall construct for the purpose of enabling their road to pass over or under any road, canal, highway, or other way," and the company omitted to perform the duty in the manner required for the public safety, it was held that the towns within which the road lay were liable to indictment for not keeping it in safe repair, and that they may compel the railway company to make all such repairs as may be necessary by mandamus, or if they have been obliged to make expenditures therein, may reimburse themselves by an action on the case against the company. 1 Redf. Railw. 538. A mandamus will lie, although the act or omission complained of subjects the corporation likewise to an indictment. Sec. 199, 2 Redf. Railw. 294. Where a railroad company is liable to erect a bridge over a highway, the town in

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whose jurisdiction the highway is situated is entitled to a writ of mandamus requiring the railroad company so to do. 7 Met. 70; S. C. 1 Am. R. Cas. 377. Mandamus is the proper remedy by which to compel a canal company to bridge over a private way which it intersects. *Habersham v. Savannah, etc., Canal Company*, 26 Ga. 665. The writ lies to command a railway or other company to make a road pursuant to their act, or to excavate or widen a road, notwithstanding the road made be more commodious than that erected by such act. Tapping Mandamus, 180. If it be urged that the foregoing authorities are based purely upon statutory requirements, the answer is, that the above mentioned city ordinance must, in this case, be held to be in the nature of a statute. Over the public highways, without the limits of a city, the legislature have retained their authority, but within the limits of a city, the legislature have delegated their authority to the common council of the city, and their acts in relation thereto will be of the same force and effect as the acts of the legislature in relation to the public highways without. The general act for the incorporation of cities, under which the city of Lawrenceburg has been acting, provides, as also did the special charter enacted in 1838, that "the common council shall have exclusive power over the streets, highways, alleys and bridges within such city, and to lay out, survey, open, straighten, widen, or otherwise alter the same, to make repairs thereto, and to construct and establish sidewalks, crossings, drains, and sewers," etc.

This act confers upon the common council plenary powers over the streets and alleys of the city. In the language of HARRIS, J., in the case of *Milhan v. Sharp*, 17 Barb. 435, in speaking of the charter of the city of New York—not broader in this respect than the section under consideration: "The corporation yet has the exclusive right to control and regulate the use of the streets in the city. In this respect, it is endowed with legislative sovereignty. The exercise of that sovereignty has no limit, so long as it is within the objects and trusts for which the power is con-

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ferred. An ordinance regulating a street is a legislative act, entirely beyond the control of the judicial power of the State." *Wood v. Mears*, 12 Ind. 515.

The demurrer to the complaint was overruled, and in view of the foregoing authorities, rightly so, as we think. Then the railroad company filed several paragraphs of answer to the complaint. The first paragraph was the general denial; and, of the others, the third and fifth only need be noticed, as all the remainder were withdrawn. The general denial, although it was also withdrawn in the end, must be noticed, for the purpose of determining whether, while the general denial remained standing as an answer to the complaint, in view thereof, the ruling of the court below in reference to the third and fifth paragraphs of answer can be held erroneous. In the third paragraph of answer, the railroad company alleges that the streets and alleys in the complaint mentioned, along and across which the said railroad is constructed, are now, at the places where said road is constructed along and across the same, in a better condition and more convenient for the passage and repassage of persons and vehicles in, upon, over, and across the same, than they severally were before and at the time of the construction of said road. And then she avers that she acquired her right of way over and across and along said streets and alleys, and that she constructed her railroad along and across such streets and alleys, under and by virtue of the provisions of the ordinance in the complaint mentioned. To this paragraph of answer a demurrer was filed by the relatrix, and sustained by the court, on the ground that it did not state facts sufficient to constitute a defence. As regards the latter averment contained in said paragraph, the answer neither denies any allegation of the complaint, nor does it confess and avoid anything in the complaint contained by affirmative matter, but simply reiterates that which is fully set out in the complaint itself. The only thing in this paragraph of answer contained, then, which requires notice, is the allegation, "that

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the streets and alleys are in a better condition, and more convenient, etc., than they were before," etc. No fact is alleged here, but simply an opinion, a mere conclusion or deduction from facts. This answer does not allege that the railroad company performed the duty required of her by the said ordinance, in reference to such streets and alleys generally; nor does it set out the facts specially, and show how and in what manner the company constructed her works and did her duty in the premises, from which it might be inferred that she complied with the requirements of the ordinance and did her duty in the premises. Nor does this paragraph show that the railroad company has done anything whatever in relation to the streets and alleys in the complaint mentioned. The ordinance makes it "the duty of the railroad company, whenever their work shall be laid upon or across any such public street, etc., to make and keep up necessary crossing places for the convenient passing over said road with horses, teams, etc." The ordinance does not require the company to place such street in a better condition and more convenient for passage, etc., than it was before the building of the railroad upon or across it, but to make such street convenient for crossing, etc. Suppose, even, that such street, before the building of the railroad upon or across it, was not only not convenient for passage upon it with horses, teams, etc., but was wholly impassable; although it may be true, that such street is now in a better condition and more convenient for passage, etc., than it was before the building of the railroad, it may nevertheless yet not be in condition for the convenient passing over the railroad with horses, teams, etc. And until such street has been placed in a condition for the convenient passing over the said road with horses, teams, etc., it cannot be maintained that the ordinance, in that respect, has been complied with. Hence the answer was clearly bad, and the demurrer to it correctly sustained. At most, the answer is but an argumentative denial of the allegations of the complaint, that the company had failed and refused to comply with her duty in the premises; and,

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as such, was already covered by the general denial on file at the time the demurrer was sustained, and hence there could then not have been error, if the answer was stricken out on motion.

In the fifth paragraph of the answer, it is alleged that the railroad company constructed her railroad upon and across said streets and alleys in the complaint mentioned under the provisions of the ordinance in said complaint stated, and that she acquired her right of way through said city by virtue of said ordinance; and she avers that from the making and constructing of her said railroad until the present time, wherever the same has been laid upon or across such streets and alleys, she has made and kept up and maintained all the necessary crossing places for the convenient passing over said railroad with horses, teams, wagons, drays, etc., and that wherever the grade of said railroad is higher than any of such streets or alleys, she has filled up the same on each side of said railroad, so as to form a convenient passage over the said road with horses, teams, wagons, persons, drays, etc. The fifth paragraph of answer the relatrix moved to strike out, on the ground that the matters therein contained are surplusage, which motion was by the court sustained. This paragraph of answer was also filed, while the general denial remained on file as an answer to the complaint. The complaint sets forth, and it is the very gist of the action, that it was necessary and the duty of the railroad company to grade the streets and alleys in the complaint mentioned, in a certain way, where the railroad is constructed in and upon a street, lengthwise; that it was necessary and the duty of the company to fill up on the sides and to grade and make such street, for the entire length covered by an embankment, of a level grade with the embankment, and flush with the rails of the road, and to the full extent of the width of such street; and where the railroad is constructed across a street or alley, that it was necessary and the duty of the company to make the street and alley crossings, of a grade not exceeding three degrees, and to the full

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extent of the width of such street and alley; and also to make the rails of the road in, upon, and across such streets and alleys, flush with the street or alley crossing, in order to make and keep up all necessary crossing places for the convenient passing over the railroad with horses, teams, etc., and to form a convenient passage over the same; but that, although thereunto requested by the relatrix, and although a reasonable time had long since elapsed, the railroad company had wholly failed and refused to perform her legal duty in the premises, to comply with the conditions and requirements of said ordinance, and to grade such streets and alleys as was necessary and was her duty in the premises, so as to leave them useful and convenient for the original purposes for which they were laid out. The railroad company having filed, as one of her answers, the denial, the relatrix was bound to prove every material allegation of her complaint, *i. e.*, that the railroad company erected embankments in, upon, or across the streets and alleys in the complaint mentioned, and constructed her road upon such embankments; that by reason of such embankments and the railroad built thereon, the passage in, upon, or across such streets was obstructed, etc., and that the railroad company had not so graded such streets and alleys, at the points where she built her railroad in, upon, or across the same, as to be convenient for passage, etc., as it was necessary and her legal duty to do, and as she was required also to do by the conditions contained in the ordinance granting her right of way. All this was necessary on the part of the city to prove, and if she did not prove it, as she could not have done if the company had performed her duty in the premises, or if she had attempted to do so, as the railroad company could have successfully contradicted it under the general denial, the matters set up in the fifth, as well as in the third paragraph of the appellant's answer were admissible for her to prove under the general denial, and hence no harm could result to the appellant, either from the sustaining of a motion to strike the same out or from the sustaining of a demurrer to

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the same. And the decision of the court being right at the time when made, the subsequent withdrawal of the general denial could certainly not reinstate either of the special answers, unless the matter was again brought to the attention of the court, and leave therefor had been asked of the court, and leave refused without just ground. Nothing of the kind was done, however, and, of course, the *ex parte* action of a party subsequent to a ruling against him, which was right or harmless and of no injurious consequence when made, cannot make such ruling wrong and erroneous. But even assuming the fifth paragraph of the answer to be an affirmative plea, not covered by the general denial, was the answer itself a valid defence?

It is true, that the answer sets up that the railroad company, whenever their work was laid upon or across any of the said streets or alleys, made all necessary crossing places for the convenient passing over said road with horses, teams, etc.; and where the grade of said road was higher than such streets or alleys, they filled up on each side of their road, to form a convenient passage over the same; but it does not set forth specially how and in what manner she constructed the street crossings, etc., so as to show that she had in fact complied with the requirements of the ordinance. It is affirmatively averred in the complaint, what was necessary to be done at street and alley crossings, to make them so as to be convenient for passing over the railroad with horses, teams, etc., and also, what was necessary to be done where the grade of the railroad was higher than such streets or alleys, to form a convenient passage over the same, and that the railroad company had not done it. In this answer appellant does not deny what the relatrix alleges was necessary to be made and done; thus admitting the truth of the allegations of the complaint. Nor does she aver that what was thus necessary to be made and done was, in fact, made and done by her. Was it not necessary, and the duty of the company, as matter of law, and as a correct interpretation of the provisions of said ordinance, that where any grading

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was required to be done by the railroad company, the whole line of, as also the whole width of, the street affected should be replaced in a conveniently passable condition? Streets have their centers for teams, their gutters for drainage, and their sidewalks for pedestrians. If, then, before the laying of a railroad across a street, it had its center graded for teaming, its gutters paved for drainage, and its sidewalks fixed for foot-passengers, and the railroad company obtaining a right of way across such street upon condition that she replace the street in as conveniently passable condition as the same was before the laying of her track across the street, what is the fair interpretation of the condition? Indeed, without any ordinance or condition to that effect, what is the fair legal duty of the company to do? It seems to us there can be but one answer, and that is to replace things, as nearly as the nature of the case will admit of, in the same condition in which they were before. And hence, a railroad company crossing a street upon a high embankment must either leave a convenient passage way underneath, or else make a crossing over, of full width, and of an easily ascendible and descendible grade, and flush with the rails of the road. Nothing less can satisfy the just and legal rights of the public to use and enjoy their public highways, free of obstructions and impediments, to their full extent, particularly in a city. That a railway company, when they alter the course or grade of a highway, in, upon, or across which they constructed their railway, must restore the highway to its former full width, under a clause in their act of incorporation to the same effect as the duty enjoined upon the appellant in said ordinance, and that a writ of mandate, to compel the performance of such duty, lies against such railway company, has been so held by the English courts, in a number of cases. *Regina v. The London and Birmingham R. W. Co.*, 1 Railw. Cas. 317; *Regina v. The Birmingham and Gloucester R. W. Co.*, 2 Railw. Cas. 694; 2 Q. B. 47; 2 Railw. Cas. 711; 1 Railw. Cas. 523; 3 Q. B. 528.

The complaint also alleges that by law, and under the pro-

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visions and conditions contained in said ordinance granting to the company right of way in, upon, and across the streets and alleys in the complaint mentioned, wherever their work was laid upon or across any such street or alley, in order to make and keep up all necessary crossing places for the convenient passing over said road with horses, teams, etc., it was necessary and the duty of the appellant to lay the rails of the road flush with the street by imbedding them, or to make the crossing flush with the rails by planking on the sides thereof or otherwise; but that the appellant had also failed and refused to so lay the rails of her road; and the motion and prayer of the complaint embraces a motion and prayer for a mandate against the railroad company, compelling the laying of the rails of the road flush with the street and alley crossings. It is nowhere affirmatively alleged in either the third or fifth paragraph of the answer, that that was done by the company, or that it was not necessary to be done, or that it was not the duty of the company to do that, and the answers each being directed to the whole complaint, but failing to answer a material part of the complaint, in itself a substantial and sufficient cause of action even if the answers were otherwise valid, were also on that account insufficient. And for the several defects in the averments of each of the third and fifth paragraphs of answer herein above pointed out, taking them as affirmative pleas, both were insufficient and bad on demurrer. And although, technically, the sufficiency of the fifth paragraph of answer, as an affirmative plea, should not have been tested on motion to strike it out, but by a demurrer, for want of sufficient facts; and taking the third paragraph of answer as a negative plea, a motion to strike it out, instead of a demurrer, should have been directed to it; yet a correct result either having been reached or being still attainable under another paragraph of answer as to both these pleas at the time of the rulings thereon by the court, the appellant will not be permitted to complain of such technical errors, nor will this court reverse the judgment on account of such errors,

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merely. The rulings of this court upon this point are so numerous and well remembered, that a reference thereto is not deemed necessary.

The venue of the cause was changed to Ohio county, but, by agreement of parties, was certified back to Dearborn county, and, by leave of court, the railroad company withdrew the general denial; and she refusing to make further answer, the court ordered and adjudged that the railroad company be, and she was, ordered and commanded forthwith, without any delay, to so construct, level, and grade the said embankments and the said railroad, side-tracks, and switches, built, erected, and constructed in and upon the said streets in the complaint mentioned, so as to make such streets, the full length and width thereof, of a grade flush with such embankments, railroad, side-track, and switches, and to fill up on the sides of such embankments, side-track, and switches, and at such street and alley crossings, so as to make the grade of such streets and alleys (excepting the alley next southeast of and running parallel with William street in said city), across which such embankments and the railroad, side-tracks, and switches, built thereon, are built, erected, and constructed, the whole width of such streets and alleys, of an easy and convenient grade for crossing such embankments and the railroad, side-tracks, and switches built thereon, such grade not to exceed three degrees; and at all points to make the rails laid in and upon and across such streets and alleys (except the alley next south-east of and running parallel with William street in said city), level and flush with the same, so that the passage and repassage of vehicles and persons in, upon, and across the same may not be prevented or obstructed, or be impracticable or difficult, but so that the same may be passable and convenient for all proper public uses, as moved and prayed for in the said complaint; and that a peremptory writ of mandate do forthwith issue against the railroad company, to compel the performance by her of the acts required and commanded to be performed by such order and judgment, etc.

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We are of the opinion that the court committed no error in overruling the demurrer to the complaint, or in sustaining the demurrer to the third and fifth paragraphs of the answer.

The judgment is affirmed, with costs.

D. S. Major and *O. B. Liddell*, for appellant.

J. Schwartz, for appellee.

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SCHIPPER v. ST. PALAIS ET AL.

CONVEYANCE.—*Construction*.—A conveyance of a lot to A., for the use of the Catholic congregation of the city of Aurora, called “St. Mary’s,” to have and to hold said premises, etc., for the use of said congregation or their assigns forever, conveys an indefeasible title in fee simple.

SAME.—*Estoppel*.—A church building was erected upon a lot thus conveyed, and after the use of the building for years for worship, the building was removed, and the use of the lot for church purposes was abandoned, and while a suit by the grantor was pending to have the deed of conveyance corrected on the ground of mistake in drafting, so as to limit its exclusive use to church purposes, and demanding a forfeiture of the lot to the grantor on account of such abandonment, the grantor took a contract to grade the street in front of said lot, under an ordinance of the city, and made an affidavit to secure the issuing of a precept for the collection of an assessment against the owner of the lot, and in said affidavit alleged that A. was the owner thereof; whereupon A. paid said assessment.

Held, that the grantor was not estopped by such affidavit from prosecuting his suit for the recovery of said lot against A.

APPEAL from the Dearborn Circuit Court.

Suit by appellant against Maurice de St. Palais, Bishop of Vincennes, and the Trustees of the Catholic congregation of the city of Aurora.

Complaint in two paragraphs. The first paragraph alleges, in substance, that on the 1st day of April, 1854, the plaintiff was seized of a lot of ground in the city of Aurora, in Dearborn county, containing thirty-five hundredths of an acre,

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which is particularly described; that he also owned other real estate, on which he resided, in the immediate vicinity of said lot, and being a member of the Catholic church, he was interested in the erection of a church edifice, for the use of said church, near his residence; and for that purpose he proposed to the Catholic residents of said city that if they would join him in the erection of a church edifice on said lot, he would donate the same to the Catholic society, to be organized "for the exclusive use thereof, the same to be appropriated as the site of such church edifice, forever, and to be used for no other purpose;" that said proposition was accepted by the Catholic residents of said city, who thereupon organized a Catholic society, called "the Catholic congregation or society of St. Mary's;" and by mutual and voluntary donations and contributions, made by the members of said society, a brick edifice was erected on said lot, for the purpose aforesaid, at a cost of five thousand dollars; "a part of the members of said congregation being Germans, and a part English, it was agreed between them, at the time of the erection of said church edifice, that in case the Catholic population of said city should so increase that said building would be insufficient for their accommodation, and they should divide, then said lot and edifice should be retained by and belong to whichever of said nationalities, German or English, that should contribute the largest amount towards the erection of said edifice;" that said building was completed and dedicated as a Catholic church, about the first of October, 1854, toward the erection of which the plaintiff contributed the sum of one hundred dollars; that from the time of its completion until the first of October, 1863, "it was used and occupied exclusively for religious purposes, and as a school-house for a Catholic school by said congregation;" that on the 22d day of October, 1859, the plaintiff, "by the direction of said congregation, and for the sole purpose of securing the permanent application of said lot to the purposes aforesaid, conveyed the same to said Maurice de St. Palais, Catholic Bishop of Vincennes, in trust

for the use of the Catholic congregation of the city of Aurora, called 'St. Mary's.'" It is further alleged, that in executing said conveyance, it was the intention of the plaintiff to convey said lot "for the sole and exclusive purpose of a site for a church edifice, to be exclusively used for that purpose, and for no other purpose whatever;" and it was so understood and intended by said bishop and said congregation; but that said provision was omitted from said conveyance by inadvertence and mistake; that there was no other consideration for said conveyance than the erection of said edifice as a perpetual place of worship for the Catholics of said city. It is then alleged, that in 1863, said congregation determined to abandon said premises, and change the site for their church edifice to a more central point in said city, and accordingly erected a new church building on another lot, the third of a mile distant from the former one, and tore down the building on the lot so donated by the plaintiff, and used the brick and other materials thereof in the erection of a school-house for the use of said congregation, in the immediate vicinity of the new church edifice. All of which was contrary to the wish and over the protest of the plaintiff.

That said congregation having thus abandoned said lot and the use thereof as a site for a church edifice, the plaintiff took possession thereof on the 1st day of December, 1863, and has ever since so held the same. But that said congregation threaten to disturb his possession, and claim that they are the owners of said lot, under the conveyance thereof to the bishop in trust, as aforesaid, and declared their intention to sell the same and apply the proceeds to the use of said congregation.

It concludes with a prayer that the title and estate conveyed by said deed of trust may be declared forfeited, and that the plaintiff be quieted in the possession of said lot, and that the deed made by him to said Maurice de St. Palais as bishop, in trust for the use of said congregation, may be reformed, and the mistake therein corrected, so as to more clearly express the intention of the parties thereto as herein-

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before stated. A copy of the deed referred to is made a part of the complaint, which, omitting the description of the premises conveyed, is as follows:

"This indenture witnesseth that Bernard Schipper and Catharine Schipper, his wife, of the county of Dearborn, in the State of Indiana, do hereby bargain, sell, and convey to Maurice de St. Palais, of the county of Knox, in the State of Indiana, for the sum of one dollar, and for the further consideration, the affection we have to the Catholic church and Catholic school, do hereby grant, bargain, sell, and convey unto the said Maurice de St. Palais, for the use of the Catholic congregation of the city of Aurora called 'St. Mary's,' it being at present used by the German and English congregations together, but, by an agreement of the members of said church, it is understood that at any time hereafter should the said church get to be too small, this lot to belong to the portion that has contributed the most money toward building said church, forever, the following real estate," etc. * * * "To have and to hold said premises, with the appurtenances, unto the said Maurice de St. Palais, for the use of said congregation or their assigns forever, and the said Bernard Schipper, for himself and heirs, doth hereby covenant with said Maurice de St. Palais that he is lawfully seized of the premises aforesaid, and that the said premises are free and clear from all incumbrances whatsoever, and that they will forever warrant and defend the same unto the said Maurice de St. Palais, for the use aforesaid, against the lawful claims of all persons whomsoever. In testimony whereof," etc.

The second paragraph is substantially the same as the first, except that it does not seek to reform the conveyance made by the plaintiff to Maurice de St. Palais for the lot, nor does it allege that any mistake was made in drafting it.

The court sustained a demurrer to the second paragraph, to which the plaintiff excepted.

An answer was then filed to the first paragraph of the complaint, consisting of two paragraphs; the first is a general denial; the second alleges, as an estoppel, the following

state of facts: that since the commencement of this suit, the city of Aurora had, by ordinance, provided for grading Market street in said city; that Schipper, the appellant, became the contractor for grading said street; that an assessment was made on said lot, which fronts on said street, by the engineer of said city, in the name of Maurice de St. Palais, for one hundred and seventeen dollars and fifty cents, for work done under said contract in front of said lot; that an account therefor was made out against said Maurice de St. Palais, with the affidavit of the appellant, the contractor, attached, stating that "Maurice de St. Palais, Bishop of Vincennes, is indebted to him in the sum of one hundred and seventeen dollars and fifty cents, being the amount of assessment due him for the improvement of Market street in front of 'hog's back,' known as the Catholic church lot, which he has refused to pay, and the estimate thereof has been made more than twenty days before the filing of this affidavit, and that the work estimated has been done according to contract," and avers that the parcel of land in controversy is the same land referred to in said affidavit.

It further alleges the issuing of a precept by the mayor to the treasurer of the city for the collection of the assessment by sale of the lot, notice thereof to Maurice de St. Palais, the payment of the assessment by him, and the receipt of the money by the appellant.

To this second paragraph of the answer the appellant demurred, but the court overruled the demurrer; to which ruling the appellant excepted; and upon his refusal to reply further, a final judgment was rendered against him for costs.

ELLIOTT, J.—Two questions are presented by the record in this case. The first arises upon the ruling of the court, in sustaining the demurrer to the second paragraph of the complaint; and the second, upon the overruling of the demurrer to the second paragraph of the answer.

The decision of the first question depends on the proper construction of the language of the deed made by the ap-

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pellant to Maurice de St. Palais, in trust, for the lot in controversy. It is insisted on behalf of the appellant that the terms of the deed clearly indicate that the lot was intended to be conveyed, and in fact was conveyed, for the exclusive purpose of a site for a church edifice, and by the abandonment of it for that purpose, the title reverted to the donor. We do not understand the language of the deed as limiting the use to which the property conveyed may be applied. It conveys the lot to Maurice de St. Palais, the bishop, for the use of the Catholic congregation of Aurora, or their assigns, forever. It is an absolute conveyance in fee, in trust, to the use of the congregation named, without any condition or limitation as to the mode of enjoyment, and, therefore, conveys an indefeasible title in fee simple. But it is urged that the demurrer admits the truth of the allegation, that the church edifice was erected under the appellant's proposition to convey the lot to the bishop, for the site of a church edifice, and for no other purpose whatever; and that, as the deed was made after the church was erected, it should be read in connection with the proposition under which the church was built. A demurrer admits whatever is well pleaded, in the pleading demurred to. It is not claimed, in the second paragraph of the complaint, that any mistake was made in drafting the deed, or that it does not clearly express the intention of the appellant at the time of its execution; and, as it was executed after the proposition referred to was made, it must be presumed, in the absence of a proper averment to the contrary, that whatever the grantor may have previously intended, the conveyance properly expresses his intention and purpose at the time of its execution; and we find nothing in the language of the deed limiting the mode in which the property conveyed should be used. We conclude, therefore, that the court did right in sustaining the demurrer.

The matters alleged in the second paragraph of the answer, it is claimed by the appellees' counsel, show a valid defence to the action, by way of estoppel *in pais*.

The doctrine of estoppel *in pais* rests on principles of equity and justice, in the prevention of fraud. A party is concluded from denying the truth of his own acts or admissions which are intended to influence the conduct of another, and do so influence it, when such denial will operate to the injury of, or as a fraud upon, the latter; for, in such case, good conscience and honest dealing require that he should be estopped from making the denial. But the doctrine can have no application where all the facts are equally known to both parties, or where the party setting up the estoppel was not influenced or deceived by the acts or admissions set up. *Fletcher v. Holmes*, 25 Ind. 458; *Ridgway v. Morrison*, 28 Ind. 201.

Here, the matters alleged occurred during the pendency of the suit. The assessment for the street improvement was a legal lien on the lot, whoever might be the owner, and the lot was liable to be sold for its payment. These facts were known alike to both parties. The appellees knew that the appellant claimed title to the lot, and was then prosecuting the action for its recovery. The condition of the title, and the questions involved in the suit in reference to it, were equally well known to both parties. Under these circumstances, we are unable to discover any ground for the assertion that the appellees were deceived or misled, in paying the assessment, by the acts of the appellant.

We think the second paragraph of the answer presents no valid defence to the action, and that the court erred in overruling the demurrer to it.

Judgment reversed, with costs, and the cause remanded, with directions to the circuit court to sustain the demurrer to the second paragraph of the answer, and for further proceedings.

GREGORY, C. J.—I do not concur in the reversal of the judgment below. The claim for street assessment was made under oath. I do not think that a party who compels pay-

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ment by his oath, can afterward be allowed to say that he committed perjury.

DOWNEY, J.—A rehearing was granted in this case, on petition of the appellees, upon the question relating to the sufficiency of the second paragraph of the answer. The case was again submitted to the court. After full consideration, we have come to the same conclusion reached by the majority of our predecessors. The decision, and the reasons for it, are so well stated in the opinion of ELLIOTT, J., that we do not deem it necessary to make any further statement of our opinion.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the second paragraph of the answer, and for further proceedings.

W. S. Holman, for appellant.

J. Schwartz, for appellees.

WYANT ET AL. v. POTTORFF ET AL.

PROMISSORY NOTE.—*Assignment*.—*Evidence*.—In a suit on a promissory note against the maker, brought by one to whom it has been assigned in writing on the back thereof, an answer of general denial puts in issue such assignment, which must be shown in evidence.

SAME.—*Attorneys' Fees*.—*Proof of Value*.—Where an agreement is contained in a promissory note, to pay attorneys' fees on collection, there must be proof of the value of the attorney's services, to authorize a finding therefor.

APPEAL from the Hamilton Common Pleas.

PETTIT, J.—The names of the parties in the assignment of errors, in the abstract, and in the brief of the appellants, are reversed, and this misled the clerk of this court, who is-

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sued a summons for the appellants, which was served on them by the proper sheriff. This would not bring the appellees before this court, but the clerk has endorsed on the transcript that the case was submitted by agreement, and we suppose the parties are properly in court. In the papers above named, the parties are called plaintiffs and defendants. These are improper designations in this court. They should be "appellants and appellees."

This was a suit on a promissory note made by the appellants to third persons, and assigned in writing on the back of it to the appellees, and in it there was a stipulation to pay attorneys' fees if suit was brought for its collection.

The general denial was in, and the cause was submitted to the court for trial; finding for the plaintiff, motion for a new trial overruled, and judgment on the finding for the face of the note and interest, and for twenty-six dollars and forty-five cents more, which we suppose was intended for attorney's fee. Overruling the motion for a new trial is assigned for error, and among the causes for a new trial are, that the finding is not sustained by sufficient evidence, and that the damages are excessive. For both of these causes, the motion for a new trial should have been sustained. A bill of exceptions informs us that the reading of the note sued upon was the only evidence given in the cause. The indorsement or assignment on the note was not read, but was put in issue by the general denial.

There was no evidence of the value of attorney's fee, and the court could not take judicial notice of and find the amount of the fee without some evidence on that subject. We do not think it necessary to decide any other question presented.

The judgment is reversed, at the costs of the appellees, and cause remanded for further proceedings.

A. F. Shirts, for appellants.

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TRUITT ET UX. v. TRUITT.

REAL ESTATE, RECOVERY OF.—*Fraudulent Conveyance.—Dismissal.—New Trial, as of Right.—Demand of Judgment.—Reasons for New Trial.*—A. purchased from the State a piece of land and received a certificate from the sinking fund commissioners, entitling him to a deed at the end of five years, on payment of interest yearly in advance, and the principal of the purchase-money at that date. A. assigned said certificate of purchase to B., executing and acknowledging an instrument reciting the assignment, and that he had also executed a note for a certain sum to B., payable in two years, and upon failure to pay the same at maturity, the title to the land described in the certificate was to vest in B. and become absolute. A. was to pay all taxes and the interest on the sum due the sinking fund. A. neglected to pay the interest, and the land was again sold by the sinking fund commissioners, and purchased, and a deed taken to A.'s wife, who had full knowledge of all the facts. B. filed a complaint against A. and wife. The first two paragraphs were to have the conveyance to the wife set aside as fraudulent and the lien enforced; the third paragraph was to quiet the plaintiff's title to the land; and the fourth was for its recovery. After the evidence was concluded and the charge of the court given to the jury, but before they retired, the plaintiff dismissed as to the third and fourth paragraphs of the complaint. The finding was for the plaintiff.

Held, that the facts stated constituted a cause of action.

Held, also, that the plaintiff had a right to dismiss as to any paragraphs.

Held, also, that the defendant was not entitled to a new trial as a matter of right. Such new trial may be claimed in actions for quieting title, or for the recovery of real estate, but cannot be demanded in a trial to set aside a conveyance as fraudulent and subject the property to sale or in an action for the specific performance of a contract regarding real estate.

Held, also, that the prayer for relief under all the paragraphs could not enlarge the allegations of the complaint as left to the jury, and the court would grant the proper remedy.

Held, also, that the reasons for a new trial urged in this court must correspond with the causes stated below.

Held, also, that the reasons for a new trial, that the court erred "in admitting evidence improperly, which was objected to by the defendants at the time," and "in refusing evidence offered by defendants, which was excepted to at the time," were too general.

APPEAL from the Delaware Circuit Court.

BUSKIRK, J.—The facts necessary to a proper understanding of the questions of law involved in this case, are as follows: That Silas Colgrove and Eleazer Coffeen, on the 23d day of November, 1857, purchased from the State of Indiana,

a tract of land situated in Delaware county, containing two hundred and forty acres, and received from the President of the Sinking Fund Board a certificate, which entitled the holder to an absolute conveyance at the expiration of five years, on the conditions that the interest on the purchase-money was paid annually, and the principal at the expiration of five years from the date of purchase. It was also provided, that upon failure to pay any instalment of interest or the principal, when due, the said land should be forfeited to the State, and again become subject to sale; that the said Colgrove and Coffeen, on the 15th day of January, 1858, for a valuable consideration, by an indorsement in writing, assigned and transferred to the appellant, Joshua Truitt, the said certificate of purchase, and placed him in possession of the said tract of land, who assumed the payment of the interest and principal due the State; that on the 28th day of August, 1863, the said Joshua Truitt assigned and transferred to Minor Truitt, the said certificate of purchase, as security for certain indebtedness, described in the assignment; that on the first day of January, 1866, the said Joshua, made, acknowledged, and delivered to the said Minor the following instrument:

“The foregoing assignment, made August 28th, 1863, is this day cancelled, and, in lieu thereof, this agreement is substituted. Joshua Truitt has, this day, executed to the said Minor Truitt, his note for twenty-four hundred dollars, due two years after date, waiving valuation laws, and I, the said Joshua Truitt, hereby assign to the said Minor Truitt, the certificate of purchase hereto attached, and all my interest and estate in the land therein mentioned, as security for the payment of said note; and it is hereby expressly agreed, that, if said note shall not be paid, on, or before the day of its maturity, then, and in that case, this assignment shall be and become absolute, and said land irredeemable by me, and on and after said day, said purchase shall absolutely vest in said Minor Truitt, and said note shall be cancelled and delivered to me.

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"It is further agreed, that said Joshua Truitt shall be privileged at any time within two years from this date to make valuable and permanent improvements upon said land, not exceeding in value the sum of five hundred dollars; and the said Joshua Truitt hereby further agrees to pay all interest in said purchase, named in said certificate, and all taxes which may become due upon said land within two years from this date."

That the said Joshua failed to pay his note to Minor, on maturity, and failed and neglected to pay the interest when it became due to the State of Indiana, on the said purchase, and by reason of such failure, the said land was and became forfeited to the State, and the title thereto was reinvested in the said State; that on the 10th day of December, 1867, the State of Indiana again offered the said land for sale at public auction, when the same was purchased by and in the name of Annie A. Truitt, the wife of Joshua Truitt, who received a certificate of purchase therefor, and on the 10th day of February, 1868, received from the State of Indiana a deed for the said tract of land; that it was alleged in the complaint that the said Joshua Truitt and Annie A. Truitt combined and confederated together, for the fraudulent purpose of depriving the said Minor Truitt of his lien on the said tract of land, and in pursuance of such fraudulent purpose, the said Joshua purposely failed, and omitted to pay the interest on the said purchase, so as to cause a forfeiture of said land to the State; that after the same had become forfeited he caused the officers of the Sinking Fund to offer the same for sale at public auction, when the same was purchased in the name of his wife, for the fraudulent purpose of cheating and defrauding the said Minor Truitt; that the said Annie A. Truitt, with full knowledge of all the rights and equities of the said Minor, took the said conveyance in her name, and now, in fraud of his rights, claims to be the absolute owner of said lands; and that the said Joshua Truitt falsely and fraudulently represented to the said Minor Truitt, that the interest on the said lands was paid, and by reason

of such false and fraudulent representation the said Minor Truitt was kept in ignorance of the non-payment of said interest, the forfeiture of said land to the State, and the resale thereof to the said Annie A. Truitt, until after the said Annie had received a deed from the State of Indiana.

The complaint was in four paragraphs. The first and second were in substance the same, and each was based upon the theory that Minor Truitt held a lien or mortgage on the said tract of land, to secure the payment of the money due him on the said note.

The third contained substantially the same facts as the first and second, but it was based on the theory that when the said Joshua failed to pay the said note at its maturity, the said assignment ceased to operate as a mortgage, but became an absolute conveyance, and vested the fee simple title in the said Minor Truitt.

The fourth paragraph alleged that Minor Truitt was the absolute owner in fee of said tract of land, and was entitled to the immediate possession thereof, and that the defendants wrongfully and unlawfully kept him out of the possession of said land.

The appellants demurred generally and separately to each paragraph of the complaint. The demurrers were overruled and the appellants excepted. The appellants then answered by the general denial. The cause was tried by a jury. After the evidence was closed, argument had, and the jury charged, but before they had retired from the presence of the court to consider of their verdict, the plaintiff dismissed the third and fourth paragraphs of the complaint. There was no separate prayer to the several paragraphs of the complaint. The general prayer at the close of the fourth paragraph was as follows:

“Wherefore, plaintiff demands judgment that the title to said real estate be conveyed to him by the said Joshua and Annie A. Truitt, and that the same be quieted in him forever, and for possession thereof; or, if that shall be impracticable, then for judgment that said premises be sold to pay

and satisfy said debt of twenty-four hundred dollars, with interest; and for other and further relief."

The jury returned a general verdict for the plaintiff on the first and second paragraphs of the complaint, and found answers to special interrogatories submitted by the court.

The court overruled a motion for a new trial, and rendered judgment on the verdict.

The appellants have assigned a large number of errors, but they should all be reduced to three, and are, first, the court erred in overruling the demurrer to the several paragraphs of the complaint; second, the court erred in overruling the motion for a new trial as a matter of right; third, the court erred in overruling the motion for a new trial for reasons assigned.

The learned counsel for the appellants have failed to point out any objection to the complaint. Since the dismissal of the third and fourth paragraphs, we are only required to determine as to the sufficiency of the first and second paragraphs of the complaint. We have examined these paragraphs and entertain no doubt that they are good. We are clearly of the opinion that the court committed no error in overruling the demurrer to the first and second paragraphs of the complaint.

The second error assigned is based upon the refusal of the court to award a new trial as a matter of right. Section 601 of article 29 of the code which relates to actions to recover the possession of real property, and to determine conflicting claims thereto, reads as follows:

"Sec. 601. The court rendering the judgment, at any time within one year thereafter, upon the application of the party against whom judgment is rendered, his heirs or assigns or representatives, and upon the payment of all costs, and of the damages, if the court so direct, shall vacate the judgment and grant a new trial. The court shall grant but one trial, unless for good cause shown." 2 G. & H. 283.

This court has very frequently been required to place a construction upon the above section of the code. There was

never any doubt that the losing party in a possessory action was entitled, upon the payment of all costs, to demand, as a matter of right, one new trial; and that, in such a case, the court had no discretion, but was bound to grant it.

It is now well settled that a new trial may be demanded as a matter of right in suits for quieting title as well as those for the recovery of the possession of real estate. *Ewing v. Gray*, 12 Ind. 64; *Shuman v. Gavin*, 15 Ind. 93; *Galletley v. Williams*, 15 Ind. 468; *Wills v. Dillinger*, 17 Ind. 253; *Shucraft v. Davidson*, 19 Ind. 98; *Zimmerman v. Marchland*, 23 Ind. 474.

It is well settled that a new trial cannot be claimed as a matter of right, in an action for a specific performance of a contract in reference to real estate. *Benner v. Benner*, 10 Ind. 256; *Perry v. Ensley*, 10 Ind. 378; *Allen v. Davison*, 16 Ind. 416; *Walker v. Cox*, 25 Ind. 271.

The losing party cannot claim, as a matter of right, a new trial in an action to set aside a conveyance as fraudulent, and to subject the same to sale upon execution. *Perry v. Ensley*, 10 Ind. 378.

It is, therefore, necessary for us to determine the precise character of the action in the case under consideration. The object and scope of the first and second paragraphs of the complaint were to set aside as fraudulent the conveyance to Mrs. Truitt, and to enforce a lien upon the land. The purpose of the third paragraph was to quiet the plaintiff's title to the land in dispute. The fourth paragraph sought to recover the possession of the land.

The appellants were not entitled to a new trial, as a matter of right, upon the causes of action set out in the first and second paragraphs; but they were so entitled under the third and fourth paragraphs of the complaint, if the plaintiff had not dismissed as to them. But it is maintained by the counsel for the appellants, that the plaintiff had no right to dismiss the causes of action set out in the said paragraphs, at the time and in the manner it was done. We are of the opinion that the plaintiff had the undoubted right to dismiss

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the whole or any part of his cause of action before the jury retired; and that when the third and fourth paragraphs were dismissed, the complaint stood as though they had never constituted a part thereof. It is not a question of amendment of pleading, but of the dismissal of causes of action. This right is given by statute. See sec. 363, 2 G. & H. 216.

It is also claimed that the complaint was left without any prayer for the relief, or that the entire prayer was left when the third and fourth paragraphs were dismissed; and that if the latter proposition is correct, there was a prayer to quiet the title and to recover the possession of the land, and that this gave the appellants the right to a new trial, as of right. We think otherwise. The prayer of the complaint cannot enlarge its allegations. *Board of Commissioners of Lagrange Co. v. Cutler*, 7 Ind. 6.

The court may grant any relief, consistent with the case made in the complaint and involved in the issue, without regard to the prayer of the complaint. *Mandlove v. Lewis*, 9 Ind. 194; *Resor v. Resor*, 9 Ind. 347.

We are of the opinion that the appellants were not entitled to a new trial as of right, under section 601 of the code, and that the court committed no error in overruling the motion therefor.

The third error assigned involves an examination of the reasons assigned for a new trial.

The first is, that the court erred in admitting the evidence of Joshua Truitt, the husband of Annie A. Truitt, over objection of appellants. It appears from the record that Joshua Truitt was not examined as a witness.

The second is, that the court erred in the instructions given. We have examined the instructions given, and are of the opinion that the appellants have no right to complain, as they are quite as favorable to them as the law would allow.

The third reason is the refusal of the court to give to the jury the eighth instruction, as asked by appellants. That instruction is based upon the supposed action of the court in

permitting Joshua Truitt to testify in the case, when his wife was a party. The instruction was correctly refused, if for no other reason, because Joshua did not testify as a witness, and the instruction asked was therefore inapplicable to the facts of the case.

The fourth reason for a new trial was based upon the alleged error of the court in permitting the plaintiff to dismiss the third and fourth paragraphs of the complaint. We have already seen that there was no error in that action of the court.

The fifth cause for a new trial was that the court erred in submitting to the jury certain interrogatories, without submitting them to the counsel for appellants for examination and objection; and we are referred to the case of *Ollam v. Shaw*, 27 Ind. 388.

The point is thus presented in the bill of exceptions: "At the plaintiff's instance the court submitted to the jury these interrogatories, which were not submitted to the examination of the court until at the close of the charges, to which the defendants had no opportunity to object; to which course the defendants also excepted at the time."

It is quite clear to us, from the above authority and many other decisions of this court, that the court below would have been justified in refusing to submit the interrogatories, for the reason that they were submitted too late; but as the court gave them, we can see no error in so doing. The reason for a new trial and the objection, as stated in the bill of exceptions, do not agree. It is urged in argument here, as a reason why a new trial should have been granted, that the appellants had no opportunity to examine the interrogatories; while the objection stated in the bill of exceptions is that the defendants had no opportunity to object. The two propositions are very different. It does not appear that the appellants asked for time to examine the interrogatories. If this had been done, and refused, the appellants would have had just cause to complain of the action of the court. But we are unable to see how the appellants were injured by the

submission of the interrogatories to the jury, as no use was made or sought to be made of them, after they were answered by either of the parties. No motion was made in reference to them, nor was any action of the court based on them. They neither benefited the plaintiff, nor injured the defendants. See *Maxwell v. Boyne*, 36 Ind. 120.

The sixth reason for a new trial was, that "the verdict is not sustained by sufficient evidence." We think otherwise. We have examined the evidence, and are clearly of the opinion that the verdict was fully sustained by the evidence.

The seventh and eighth reasons for a new trial were as follows: "seventh, in admitting evidence improperly, which was objected to by the defendants at the time; eighth, in refusing evidence offered by defendants, which was excepted to at the time."

The above reasons were too general. They fail to point out what evidence was admitted or refused. Neither the court below nor this court can understand what evidence was improperly admitted or excluded.

We have not considered one question that has been very ably discussed by the learned counsel for the appellants, for the reason that we are of the opinion that it does not arise in the record. The point discussed is, that the court admitted the admissions and declarations of Joshua Truitt in evidence over the objection and exception of the appellants.

The first reason for a new trial is as follows: "first, the court erred in admitting the evidence of Joshua Truitt over objections of defendants at the time, he being the husband of Annie Truitt."

The first error assigned is as follows: "first, in allowing the statements of Joshua Truitt, made out of court, to be given to the jury over objections." There is a wide and marked difference between the reason assigned for a new trial and the error assigned. The counsel have discussed the error assigned, but as the matter embraced therein was not called to the attention of the court below, it cannot be considered here. Great injustice might be done to the court

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below and the other party by deciding a question that the lower court had no opportunity to review and correct.

We are of the opinion that the court committed no error in overruling the motion for a new trial on the reasons assigned.

The judgment is affirmed, with costs.

T. J. Sample and *J. W. Sansberry*, for appellants.

C. E. Shipley, *W. March*, and *W. Brotherton*, for appellee.

HYLAND *v.* THE WATER WORKS COMPANY OF INDIANAPOLIS ET AL.

FEES AND SALARIES.—*Statute*.—Section ten of the act of February 21st, 1871, known as the fee and salary law, is constitutional.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—The only question in this case is, whether section ten of the act of February 21st, 1871, known as the fee and salary law, which fixes one dollar and fifty cents as the *per diem* of witnesses attending the Supreme, circuit, and criminal courts, and courts of common pleas, is valid or not. We have concluded that it is valid.

The judgment of the common pleas, taxing the witness fees in this case as thus fixed, is therefore affirmed, with costs.

N. B. Taylor, *E. Taylor*, *T. A. Hendricks*, *O. B. Hord*, *A. W. Hendricks*, *J. Hanna*, *F. Knefler*, *J. E. McDonald*, *J. M. Butler*, and *E. M. McDonald*, for appellant.

A. G. Porter, *B. Harrison*, and *C. C. Hines*, for appellees.

BARNES *v.* LOYD ET AL.

STATUTE OF DESCENT.—*Sixth Section*.—A. and his wife conveyed lands to B. and his wife, the consideration being natural love and affection, the wife of B.

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being the daughter of the grantors. B. and wife had two children. The wife died; and B. married again, and had five children by his second wife; and B. died;

Held, that, on the death of B., the seven children inherited equally.

APPEAL from the Decatur Circuit Court.

WORDEN, C. J.—In February, 1830, Nathaniel Potter and his wife conveyed certain lands in said county, for no other consideration than natural love and affection, to John Loyd and Sally Loyd, his wife, the said Sally, being the daughter of Mr. and Mrs. Potter. John and Sally Loyd had born to them two children, when Sally, in September, 1831, died, leaving John surviving her. John afterward married a second wife, not of kin to any of the Potter family, and by her he had five children, when she died, leaving John surviving her also. Finally, John departed this life in September, 1867.

The question in the cause is, whether, upon the death of John Loyd, the land descended to all his seven children, or only to the two by his marriage with Sally Potter. The court below decided that it descended to all the children equally.

By the original deed from Potter and wife to Loyd and his wife, each of the latter became seized of the estate by entireties, and not by moieties. As the two individuals, in law, constitute but one person, so there was but one entire estate granted, and each individual, in connection with the other, was seized of that entire estate. It could not be aliened or encumbered by the one without the consent of the other; and upon the death of the one, the estate survived to the other. Upon the death of the one, the estate of the survivor was not enlarged, for he was already seized of the entire estate, but the interest of his co-tenant was extinguished. Upon the death of Sally Loyd, John, her husband, became seized of the estate in severalty, by survivorship, as fully as if the original estate had been conveyed to him in severalty. See, on this subject, the case of *Chandler v. Cheney*, ante, p. 391.

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John Loyd, then, being the owner of the land in severalty, and dying intestate, it follows that it descended in equal portions to all his children, just as any other estate would have descended, unless there is something in our statute that prescribes a different rule of descent in such cases.

The appellant relies upon the sixth section of the statute regulating descents, etc., 1 G. & H. 292, which provides that "kindred of the half blood shall inherit equally with those of the whole blood; but if the estate shall have come to the intestate by gift, devise, or descent, from any ancestor, those only who are of the blood of such ancestor shall inherit," etc.

Did the estate in question "come to the intestate by gift, devise, or descent from any ancestor"?

The appellant contends that if the estate came by gift, etc., to the intestate from any ancestor of the intestate's heirs, the case falls within the provisions of the section quoted; and hence that two children only, viz., those of John and Sally, can inherit.

This is contrary to the letter, and, as we think, to the spirit of the statute. The plain reading requires the estate to come to the intestate from an ancestor of the intestate. "If the estate shall have come to the intestate * * from any ancestor." What ancestor could have been intended but an ancestor of the intestate?

We are of the opinion that to bring a case within the provisions of the section quoted, the estate must have come to the intestate by gift, devise, or descent from some ancestor of the intestate; and this is believed to be in entire harmony with the decisions of this court that have any bearing upon the point. *Greenlee v. Davis*, 19 Ind. 60; *Smith v. Smith*, 23 Ind. 202; *Coffman v. Bartsch*, 25 Ind. 201; *Murphy v. Henry*, 35 Ind. 442.

The word ancestor, as used in this statute, has been held to include all from whom a title by descent could be derived under any circumstances, and as synonymous with kindred. *Greenlee v. Davis, supra*.

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It is quite clear that Mr. and Mrs. Potter were not ancestors of John Loyd; and the case, therefore, does not come within the section of the statute relied upon by the appellant.

We are of opinion that the court below decided the law correctly.

The judgment below is affirmed, with costs.

C. Ewing, J. K. Ewing, and W. O. Foley, for appellant.

B. W. Wilson, for appellees.

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PARTNERSHIP.—Mortgagee's Right to Sell Interest of Partner.—Right of Partners to Subject Partnership Property to Debts.—The interest of a partner in a firm consists of his proportion of whatever balance may ultimately be left after the payment of the partnership debts and settlement of accounts between the partners, and either partner may mortgage such interest in the partnership property, and the mortgagee may sell the same on foreclosure, and the other partners cannot resist such sale on the ground that the partnership debts exceed the partnership property. The mortgagee is entitled to have the ultimate interest of the mortgagor in the property sold, and the purchaser takes that interest. The sale does not affect the right of the other partners to insist upon the application of the joint property to the payment of the firm debts and to the payment of any balance due them.

APPEAL from the Howard Common Pleas.

DOWNEY, J.—The appellant sued Nathan Sohl and his wife, Catharine Bockman, guardian of Frank Gerstner, an infant, Walter N. Evans, and John F. McClellan, alleging in his complaint that Sohl and wife executed a mortgage to him of certain real estate as security for the payment of the purchase-money due therefor, evidenced by a promissory note, a copy of each of which was filed with the complaint, and alleging, further, that by mistake the mortgage embraced the whole, when it should have embraced only the undivided one-third thereof; that said other defendants claim

an interest in the mortgaged premises. He asked for a correction of the mistake in the mortgage, and for its foreclosure, etc.

At the first appearance of the parties in court, the plaintiff dismissed the action as to Catharine Bockman, Walter N. Evans, and John F. McClellan, but on their motion, Evans and McClellan were again made parties to the action. Sohl and wife made default, and judgment was rendered for the amount due the plaintiff, and for the sale of the mortgaged premises, subject to any interest of Evans and McClellan therein.

At this point, McClellan filed a paper, stating that he had sold his interest in the mortgaged premises to James L. Evans; and he went out of the case, and James L. Evans came in as the successor to his interest in the controversy.

For an answer and cross complaint, Walter N. Evans and James L. Evans alleged against Smith and Sohl and wife that on the 22d day of February, 1868, Walter N. Evans purchased all the property described in the complaint at a judicial sale, made by James L. Evans, as a commissioner of the Hamilton Common Pleas, for eleven thousand two hundred dollars, subject to liens thereon amounting to eight thousand five hundred dollars, making nineteen thousand seven hundred dollars, and received a certificate for a deed if the sale should be approved by the court; that the said eleven thousand two hundred dollars was found by the court to be due to A. J. and L. Sohl and William Spotts, one-half to Spotts and the other to A. J. and L. Sohl. But the defendants allege the truth to be that one-half of said eleven thousand two hundred dollars, ordered to be paid as aforesaid to said A. J. and L. Sohl, was in reality due to, and was the property of, the said Nathan Sohl; that within less than one week after said Walter N. Evans became the owner of said property as aforesaid, he sold the same to the firm of Walter N. Evans, Nathan Sohl, and William Spotts for the same sum which he agreed to pay for the same at said commissioner's sale; and the said firm agreed to take said prop-

and satisfy said debt of twenty-four hundred dollars, with interest; and for other and further relief."

The jury returned a general verdict for the plaintiff on the first and second paragraphs of the complaint, and found answers to special interrogatories submitted by the court.

The court overruled a motion for a new trial, and rendered judgment on the verdict.

The appellants have assigned a large number of errors, but they should all be reduced to three, and are, first, the court erred in overruling the demurrer to the several paragraphs of the complaint; second, the court erred in overruling the motion for a new trial as a matter of right; third, the court erred in overruling the motion for a new trial for reasons assigned.

The learned counsel for the appellants have failed to point out any objection to the complaint. Since the dismissal of the third and fourth paragraphs, we are only required to determine as to the sufficiency of the first and second paragraphs of the complaint. We have examined these paragraphs and entertain no doubt that they are good. We are clearly of the opinion that the court committed no error in overruling the demurrer to the first and second paragraphs of the complaint.

The second error assigned is based upon the refusal of the court to award a new trial as a matter of right. Section 601 of article 29 of the code which relates to actions to recover the possession of real property, and to determine conflicting claims thereto, reads as follows:

"Sec. 601. The court rendering the judgment, at any time within one year thereafter, upon the application of the party against whom judgment is rendered, his heirs or assigns or representatives, and upon the payment of all costs, and of the damages, if the court so direct, shall vacate the judgment and grant a new trial. The court shall grant but one trial, unless for good cause shown." 2 G. & H. 283.

This court has very frequently been required to place a construction upon the above section of the code. There was

never any doubt that the losing party in a possessory action was entitled, upon the payment of all costs, to demand, as a matter of right, one new trial; and that, in such a case, the court had no discretion, but was bound to grant it.

It is now well settled that a new trial may be demanded as a matter of right in suits for quieting title as well as those for the recovery of the possession of real estate. *Ewing v. Gray*, 12 Ind. 64; *Shuman v. Gavin*, 15 Ind. 93; *Galletley v. Williams*, 15 Ind. 468; *Wills v. Dillinger*, 17 Ind. 253; *Shucraft v. Davidson*, 19 Ind. 98; *Zimmerman v. Marchland*, 23 Ind. 474.

It is well settled that a new trial cannot be claimed as a matter of right, in an action for a specific performance of a contract in reference to real estate. *Benner v. Benner*, 10 Ind. 256; *Perry v. Ensley*, 10 Ind. 378; *Allen v. Davison*, 16 Ind. 416; *Walker v. Cox*, 25 Ind. 271.

The losing party cannot claim, as a matter of right, a new trial in an action to set aside a conveyance as fraudulent, and to subject the same to sale upon execution. *Perry v. Ensley*, 10 Ind. 378.

It is, therefore, necessary for us to determine the precise character of the action in the case under consideration. The object and scope of the first and second paragraphs of the complaint were to set aside as fraudulent the conveyance to Mrs. Truitt, and to enforce a lien upon the land. The purpose of the third paragraph was to quiet the plaintiff's title to the land in dispute. The fourth paragraph sought to recover the possession of the land.

The appellants were not entitled to a new trial, as a matter of right, upon the causes of action set out in the first and second paragraphs; but they were so entitled under the third and fourth paragraphs of the complaint, if the plaintiff had not dismissed as to them. But it is maintained by the counsel for the appellants, that the plaintiff had no right to dismiss the causes of action set out in the said paragraphs, at the time and in the manner it was done. We are of the opinion that the plaintiff had the undoubted right to dismiss

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the whole or any part of his cause of action before the jury retired; and that when the third and fourth paragraphs were dismissed, the complaint stood as though they had never constituted a part thereof. It is not a question of amendment of pleading, but of the dismissal of causes of action. This right is given by statute. See sec. 363, 2 G. & H. 216.

It is also claimed that the complaint was left without any prayer for the relief, or that the entire prayer was left when the third and fourth paragraphs were dismissed; and that if the latter proposition is correct, there was a prayer to quiet the title and to recover the possession of the land, and that this gave the appellants the right to a new trial, as of right. We think otherwise. The prayer of the complaint cannot enlarge its allegations. *Board of Commissioners of Lagrange Co. v. Cutler*, 7 Ind. 6.

The court may grant any relief, consistent with the case made in the complaint and involved in the issue, without regard to the prayer of the complaint. *Mandlove v. Lewis*, 9 Ind. 194; *Resor v. Resor*, 9 Ind. 347.

We are of the opinion that the appellants were not entitled to a new trial as of right, under section 601 of the code, and that the court committed no error in overruling the motion therefor.

The third error assigned involves an examination of the reasons assigned for a new trial.

The first is, that the court erred in admitting the evidence of Joshua Truitt, the husband of Annie A. Truitt, over objection of appellants. It appears from the record that Joshua Truitt was not examined as a witness.

The second is, that the court erred in the instructions given. We have examined the instructions given, and are of the opinion that the appellants have no right to complain, as they are quite as favorable to them as the law would allow.

The third reason is the refusal of the court to give to the jury the eighth instruction, as asked by appellants. That instruction is based upon the supposed action of the court in

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permitting Joshua Truitt to testify in the case, when his wife was a party. The instruction was correctly refused, if for no other reason, because Joshua did not testify as a witness, and the instruction asked was therefore inapplicable to the facts of the case.

The fourth reason for a new trial was based upon the alleged error of the court in permitting the plaintiff to dismiss the third and fourth paragraphs of the complaint. We have already seen that there was no error in that action of the court.

The fifth cause for a new trial was that the court erred in submitting to the jury certain interrogatories, without submitting them to the counsel for appellants for examination and objection; and we are referred to the case of *Ollam v. Shaw*, 27 Ind. 388.

The point is thus presented in the bill of exceptions: "At the plaintiff's instance the court submitted to the jury these interrogatories, which were not submitted to the examination of the court until at the close of the charges, to which the defendants had no opportunity to object; to which course the defendants also excepted at the time."

It is quite clear to us, from the above authority and many other decisions of this court, that the court below would have been justified in refusing to submit the interrogatories, for the reason that they were submitted too late; but as the court gave them, we can see no error in so doing. The reason for a new trial and the objection, as stated in the bill of exceptions, do not agree. It is urged in argument here, as a reason why a new trial should have been granted, that the appellants had no opportunity to examine the interrogatories; while the objection stated in the bill of exceptions is that the defendants had no opportunity to object. The two propositions are very different. It does not appear that the appellants asked for time to examine the interrogatories. If this had been done, and refused, the appellants would have had just cause to complain of the action of the court. But we are unable to see how the appellants were injured by the

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The interest of a partner may be sold on execution for his individual debt; and, we think, upon mortgage by him also.

On a dissolution, each partner has the right to insist upon a sale of the partnership property, as the proper mode of ascertaining its value; and one or more of them cannot, in the absence of an agreement to that effect, retain the property at a valuation. *Lindley Partnership*, 1023, *et seq.*; *Story Partnership*, sec. 207.

One succeeding to the interest of a partner in the concern, by purchase or assignment from him, or by sale on execution against him, or on a mortgage of his share (any one of which operates as a dissolution of the partnership), has the right to insist upon an account and sale. *Lindley Partnership*, 957; 1 *Story Eq. Jur.*, sec. 677.

When the mortgage in question was executed by Sohl to Smith, May 20th, 1868, Walter N. Evans, Nathan Sohl, and William Spotts were the members of the firm then existing. On the 15th of October, 1868, this firm was dissolved, as shown by the cross complaint. It is not easy to see how the rights of Smith, under his mortgage, could be affected by the formation of the various new firms which were afterward constituted, or by their subsequent management of the property in which he had thus become interested.

We are quite clear that Smith had a right to foreclose his mortgage, and sell whatever ultimate interest of Sohl he acquired by virtue of the mortgage, notwithstanding the existence of partnership debts. A sale under the judgment, as entered, will not affect the right of his co-partners, if any they have, to insist upon the application of the joint property to the payment of the firm debts, and to the payment of any balance due to them.

As bearing more or less directly upon this question, we refer to the following additional authorities: *Taylor v. Fields*, 4 Ves. 396, and n. 1; *Corwell v. Sandidge's Adm'r*, 8 Dana, Ky. 273; *Hodges v. Holeman*, 1 Dana, Ky. 50; *Wilson v. Bowden*, 8 Rich. 9; *Horton's Appeal*, 13 Pa. St. 67; *Murray v. Murray*, 5 Johns. Ch. 60; *Mathewson v. Clarke*, 6 How. U.S.

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122; *Recce v. Hoyt*, 4 Ind. 169; *Olleman v. Reagan's Adm'r*, 28 Ind. 109; *Matlock v. Matlock*, 5 Ind. 403; *Holland v. Fuller*, 13 Ind. 195; *Schæffer v. Fithian*, 17 Ind. 463; *Dunham v. Hanna*, 18 Ind. 270.

The cross complaint in this case is not adapted to a settlement of the affairs of the firm, which was dissolved the 15th of October, 1868, and cannot be sustained as a complaint for that purpose. Whether the facts alleged in the pleadings, and adduced in evidence, show that the debt due to Smith was or was not an individual debt of Sohl, we do not decide. Nor do we decide anything with reference to the question of estoppel, presented by the pleadings.

The court should have sustained, instead of overruling, the demurrer to the cross complaint.

The judgment is reversed, with costs; and the cause is remanded.

D. Moss, for appellant.

C. A. Ray, J. M. Davidson, and G. H. Voss, for appellees.

CHEEK ET AL. v. THE STATE.

PRACTICE.—*New Trial.—Statement of Cause.*—In a criminal action, the reason for a new trial, that “the court erred in refusing to admit competent and proper evidence offered by the defendants,” is too vague and indefinite. The reason should state the evidence offered and refused, or by what witness it was proposed to introduce the evidence.

APPEAL from the Decatur Common Pleas.

PETTIT, J.—This was a prosecution by information for malicious trespass in destroying the tile in and injuring the drain of Jacob F. Robins. Plea, not guilty; trial by the court; finding of guilty, and fine of two dollars and fifty cents each; motion for new trial overruled; exception taken; and judgment on the finding.

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The errors assigned are, first, the court erred in refusing proper and competent evidence offered by the appellants on the trial in the court below; second, the court erred in overruling the motion of appellants for a new trial.

The first is not assignable for error in this court. It is only an attempt to assign for error what the pleader thought was a cause for a new trial.

The causes for a new trial are, first, the decision of the court was contrary to law; second, the decision of the court was contrary to the evidence; third, the court erred in refusing to admit competent and proper evidence offered by the defendants.

The third is not a proper cause for a new trial. It is too vague and indefinite. It should have stated what evidence was offered and refused by the court, or by whom the evidence was offered to be made. Without such particularity, the court would have to go through, or over all the evidence offered and rejected, to hunt out what particular item of it was improperly rejected. Injustice might be done to the court, and to the adverse party, unless the particular evidence offered, and rejected, was pointed out in the motion for a new trial.

As to the first and second reasons for a new trial, we are not able to see why the decision is contrary to law or the evidence. The law clearly warrants the action of the court, and as to the evidence, it is clear, direct, and conclusive, and fully warrants the finding and judgment of the court; but if it was conflicting and doubtful, we could not reverse the judgment.

The judgment is affirmed, at the costs of the appellants.

W. Cumback, S. A. Bonner, J. Gavin, and J. D. Miller,
for appellants.

J. S. Scobey, O. B. Scobey, E. R. Monfort, C. Ewing, J. K. Ewing, and B. W. Hanna, Attorney General, for the State.

Johnson v. McCabe *et al.*

JOHNSON v. MCCABE ET AL.

PROMISSORY NOTE.—*Pleading.*—*No Consideration.*—In a suit on a promissory note, by an assignee against the maker, an answer that the note was executed without any consideration is good.

SAME.—*Patent Right.*—*False Representation.*—In such an action, an answer that the note was given for a patent right, and that the vendor, the payee, represented that the invention was a new and useful one, and the purchaser, the maker, ignorant as to the truth, made the purchase, relying on said representations, and that the same were false, is a good defence.

SAME.—*Written Contract.*—*Parol Evidence.*—Where a contract of purchase is reduced to writing, and contains no warranty, one cannot be proved by parol.

APPEAL from the Ripley Circuit Court.

BUSKIRK, J.—This was an action by the appellant on a promissory note executed by the appellees, payable to George P. Tyler, who assigned the same to the appellant.

The appellees answered in nine paragraphs. The appellant demurred separately to each paragraph. The demurrer was sustained to the first and eighth paragraphs, and overruled as to the others. The appellant excepted to the overruling of the demurrers. The appellant replied in two paragraphs. The first was the general denial; the second set up new facts tending to show that Hamilton, one of the appellees, was estopped from making any defence to the action. The cause was tried by a jury, and resulted in a finding for all the defendants. The court overruled a motion for a new trial, and rendered a final judgment on the verdict.

The appellant has assigned and relies upon two errors for the reversal of the judgment.

The first is, that the court erred in overruling the demurrer to the second, third, fourth, fifth, seventh, and ninth paragraphs of the answer. The second is, that the court erred in overruling the motion for a new trial.

The first error involves the correctness of the action of the court in overruling the demurrer to the several paragraphs of the answer as above set out.

The answers are very lengthy, entirely too much so to

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copy them into this opinion. We will try to abbreviate them, so that much space can be saved, and the point decided can be understood.

The second paragraph admits the execution of the note sued on, but avers that the same was executed by Squire L. McCabe as principal, and by the other makers as his securities; that the note was given for and in consideration of the right of making, using, and vending to others to use, in the State of Wisconsin, Griswold's patent fanning mill; that the purchaser was young and inexperienced in such matters, and resided in Ripley county, Indiana, and was wholly unacquainted in the State of Wisconsin; that the said George P. Tyler, for the purpose of inducing the said purchaser to make such purchase, made certain false and fraudulent representations and warranties in reference to the said mill, and what it would do and perform, and which are set out with great detail and particularity; that the said purchaser, being ignorant of such matters, relied upon the said representations as true, and made the said purchase, and the breaches of the said warranties are set out with great minuteness.

It does not appear that any deed was executed, or written contract entered into between the parties, other than the note. The facts alleged in this paragraph of the answer make a good plea of fraud, and the court committed no error in overruling the demurrer.

The third paragraph alleged that the note was executed without any consideration. The answer was clearly good.

The fourth, fifth, sixth, and ninth paragraphs were in substance the same. Each set out the consideration of the note as in the second paragraph. In each it was alleged that Tyler, the vendor of the patent right, represented that the invention was a new and useful one; that the purchaser was ignorant of the truth of such representation, but in reliance upon the same as true, made the purchase; and it was alleged and averred in each paragraph that it was not a new and useful invention, but was worthless. The ninth, in addition to the above allegations, also contained averments of warranties

by Tyler as to what the mill would do, and the breaches thereof.

The appellant relies upon the case of *Kernodle v. Hunt*, 4 Blackf. 57, to show that the above answers constituted no defence to the action. The above case is not strictly applicable, for the reason that it was not averred in the answers that the invention was not new and useful; while in this case it is expressly averred that Tyler represented the invention to be a new and useful one.

This case seems to come clearly within the principle of law laid down by this court in *McClure v. Jeffrey*, 8 Ind. 79, which was an action upon a promissory note which had been given for a patent right, and where the defendant pleaded in bar of the action that the vendor had represented and warranted that the invention was a new and useful one, when, in fact, it was not a new and useful improvement. The court say:

“Under the patent laws of the United States, the thing alleged to have been patented must be a new invention, not known or used before the application for a patent; otherwise, the patent itself is invalid. Curtis on Patents, secs. 1, 66; *Earle v. Sawyer*, 4 Mason, 6. And it has been decided that, in an action upon a note given for a patent right, the plaintiff cannot recover if it appear that the invention for which the patent was granted was not new and useful, although both parties acted in good faith in giving and receiving the note. *Geiger v. Cook*, 3 Watts and Serg. 266. This seems to be a correct exposition of the law. And the defences under consideration contain that which amounts to an express warranty by the vendor of the patent, that the invention was new and useful, with an averment that it is neither.”

By section one of the act of 1793 (re-enacted by section six of the act of July 4th, 1836), it is provided, “that any person or persons having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter, not known or used by others

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before his or their discovery or invention thereof, and not, at the time of his application for a patent, in public use or on sale, with his consent or allowance, as the inventor or discoverer, and shall desire to obtain an exclusive property therein, may make application in writing," etc.

The above section of the act of Congress provides for two classes of inventions. The first is, where the art, machine, manufacture, or composition of matter is entirely new. The second is where there is an improvement upon such art, machine, manufacture, or composition of matter. But in both cases the invention must be new and useful.

In *Ransom v. Mayor, etc., of N. Y.*, 1 Fisher Patent Cas. 251, the court instructed the jury as follows: "You will have observed, gentlemen, that it is required that there should be an invention, that the invention should be new, and that it should be useful. In other words, before a patent can be issued, the thing patented must appear to be of such a character, as to involve or require 'invention' for its production, require the exercise of the genius of an inventor as contradistinguished from the ordinary skill of a mechanic in construction. It must also be new. The party applying for the patent must be the first and the original inventor, and it must also be of such a character as to be capable of application to the advantage and benefit of mankind."

As to the character of the novelty, and the degree of utility required to render a patent valid, under the act of Congress, we refer to the following adjudged cases: *Many v. Sizer*, 1 Fisher Patent Cas. 17; *Winans v. New York and Erie Railroad Company*, *id.* 213; *Sickles v. Gloucester Manufacturing Company*, *id.* 222; *Wintermute v. Redington*, *id.* 239; *Page v. Ferry*, *id.* 298; *Johnson v. Root*, *id.* 351; *Bell v. Daniels*, *id.* 372; *Vance v. Campbell*, *id.* 483; *Hays v. Sulzor*, *id.* 532; *Judson v. Moore*, *id.* 544; *Singer v. Walmsley*, *id.* 558; *Judson v. Cope*, *id.* 615; *Pitts v. Wemple*, 2 Fisher Patent Cas. 10; *Poppenhusen v. New York Gutta Percha Comb Company*, *id.* 62; *Eames v. Cook*, *id.* 146; *Cox v. Griggs*, *id.* 174; *Tilghman v. Werk*, *id.* 229; *Magic Ruffle Company v.*

Douglas, id. 330; *Wayne v. Holmes, id.* 20; *Hussey v. Whitely, id.* 120; *Tompkins v. Gage, id.* 577; *Hoffheins v. Brandt*, 3 Fisher Patent Cas. 218; *Crompton v. Belknap Mills, id.* 536; *Potter v. Whitney, id.* 77; *Turrill v. Illinois Central Railroad, id.* 330; *Blandy v. Griffith, id.* 609; *Sayles, v. Hapgood, id.* 632.

We are of the opinion that the fourth, fifth, sixth, and ninth paragraphs of the answer were good, and that the court committed no error in overruling the demurrer to them.

We are next required to determine whether the court erred in overruling the demurrer to the seventh paragraph of the answer. The seventh paragraph alleged, in substance, that Squire L. McCabe was the principal in the note sued on, and that the other defendants were his sureties; that the note was executed for and in consideration of the sale, by Tyler, to the principal in said note, of Griswold's patent fanning mill, and the right to sell the mill, and the patent right in the State of Wisconsin; that the said Tyler executed to him a deed for the said patent right, a copy of which was filed with and made a part of the answer; that the said Tyler, for the purpose of inducing him to enter into and make such contract, falsely and fraudulently warranted that said mill would clean grass seed from chaff or grain, of any and all kinds, perfectly, the first time running the same through said mill; and it was averred that the separators would not clean grass seed from chaff, and grain of any and all kinds, the first time running the same through said mill, or at all without first cleaning the grass seed by some other means, and then mixing it with grain prepared on purpose; and that said McCabe relied on said warranty, and was induced to make said contract and execute the said note.

The purpose of the pleader, in the preparation of the above paragraph, was to show that Tyler had warranted that the mill would clean grass seed from chaff or grain, and to recover damages for a breach of such warranty. It was not intended to set up false and fraudulent representations, that would vitiate the entire contract. The allegations in the pleading amount to a warranty, founded upon an express

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contract. The contract between the parties was reduced to writing, and consisted of the deed by Tyler and the note by the appellees.

There is no warranty in the deed, or condition in the note. Was it competent for the appellees to allege and prove a parol warranty? We think it was not. The law is well settled. An eminent law writer states the law thus: "No warranty can be implied from circumstances, if there be an express refusal to warrant. And where the contract of sale is in writing, and contains no warranty, there parol evidence is not admissible to add a warranty. And if there be a warranty in writing, it cannot be enlarged or varied by parol evidence." 1 Parsons Con. 589.

It was held by this court in *McClure v. Jeffrey*, 8 Ind. 79, that, "as a general rule, where the contract of sale has been consummated by writing, the presumption is, the writing contains the whole contract. *Van Ostrand v. Reed*, 1 Wend. 424. Here, the contract stated in the defence is an entire contract, the whole of which is to be considered as included in the deeds and note. The rule is, that all oral negotiations or stipulations between the parties, which preceded or accompanied the execution of the instrument, are to be regarded as merged in it, and that the latter is to be treated as the exclusive medium of ascertaining the agreement to which the contractors bound themselves."

We are of the opinion that the court erred in overruling the demurrer to the seventh paragraph of the answer; and, for such error, the judgment must be reversed.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to sustain the demurrer to the seventh paragraph of the answer, and for further proceedings in accordance with this opinion.

W. D. Willson, for appellant.

W. D. Ward, *R. M. Goodwin*, and *J. O. Cravens*, for appellees.

Hall v. Allen.

HALL v. ALLEN.

PROMISSORY NOTE.—Pleading.—Presumptions of Law.—A complaint by A., the holder, against B., the maker, on a promissory note, payable at a bank in this State to C., or bearer, need not aver a demand at the bank where payable. Where such complaint shows that the plaintiff is the holder of the note by averring the indorsement thereof to him by one to whom it was transferred, by delivery by the payee, the presumption of law, that every holder of negotiable paper is the owner, and that he took it for value, and before dishonor, and in the regular course of business, need not be averred. An answer to such a complaint stating an equitable defence as against the maker is not good without an averment of notice to the plaintiff before he received the note.

APPEAL from the Warren Common Pleas.

WORDEN, C. J.—Complaint by the appellee as holder, against the appellant as maker, of the following promissory note:

“\$200.

PINE VILLAGE, July 24th, 1867.

“One year after date, I promise to pay to H. C. Downer, or bearer, two hundred dollars, for value received, with interest, without release” (relief) “from valuation or appraisement laws. Payable at the First National Bank of Lafayette, Ind. (Signed) JAMES E. HALL.”

The complaint alleges that Downer transferred the note before maturity, by delivery, to Thomas D. Odle, and that Odle indorsed the same to the plaintiff.

A demurrer to the complaint, for the want of sufficient facts, etc., was overruled, and the defendant excepted.

The defendant answered, thirdly, that the note was obtained by fraud and false representations, but did not aver any knowledge thereof, on the part of Odle, or the plaintiff. A demurrer for the want of sufficient facts was sustained to this paragraph of the answer, and the defendant excepted. Trial of the issues joined, by the court; finding and judgment for the plaintiff.

The errors assigned are upon the rulings of the court in overruling the demurrer to the complaint, in sustaining the demurrer to the third paragraph of the answer, and in overruling a motion for a new trial.

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The point made against the complaint is, that it does not aver a demand at the bank where payable, before suit was brought. This is expressly rendered unnecessary by statute. 2 G. & H. 107, sec. 82. A demand when due is necessary to charge the indorser of commercial paper, but that is not this case. The demurrer to the complaint was correctly overruled.

In order to pass understandingly upon the validity of the third paragraph of the answer, it becomes necessary to examine the case made by the complaint.

The note in suit being payable to Downer, or bearer, in a bank in this State, is governed by the law merchant. Such a note, being payable to bearer, may be transferred by delivery merely, and needs no indorsement in order to transfer the absolute title. And a transferee of such paper by delivery receives it also as free from all equitable defences as a transferee by indorsement. 2 Parsons Notes and Bills, 42. The plaintiff's rights, as against the maker, are no greater for the indorsement of Odle than they would have been had the note been delivered without indorsement.

But the holder of commercial paper, in order to cut off the equities of the maker, must have received it before maturity, for a valuable consideration, and without notice of the maker's equities.

The complaint alleges that Downer transferred the note to Odle before maturity, but does not aver that the transfer was made upon a valuable consideration. It does not allege the consideration upon which, or the time when, the note was indorsed by Odle to the plaintiff.

The complaint is sufficient to show, however, that the plaintiff is the holder of the note, through these transfers. What presumptions of law are indulged in his favor as such holder? This question is answered by a reference to the author above quoted, who says (vol. 1, page 255), that "there is a *prima facie* presumption of law in favor of every holder of negotiable paper, to the extent that he is the owner of it, that he took it for value, and before dishonor, and in the regular course of business."

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These facts need not have been alleged in the complaint, because they are presumed from the allegations showing the plaintiff to be the holder. Presumptions of law need not be stated in pleading. 2 G. & H. 111, sec. 88.

It being presumed then, from the plaintiff being the holder of the note, as alleged in the complaint, that he was such holder for value, having received it before due, and in the regular course of business, it would seem to follow, necessarily, that the defence set up, without averring that the plaintiff had notice thereof at the time he received the note, must be fatally defective.

We are of opinion that the demurrer was correctly sustained to the paragraph of the answer in question.

The finding of the court was amply sustained by the evidence, and the motion for a new trial was properly overruled.

The judgment below is affirmed, with costs and five per cent. damages.

J. H. Brown, for appellant.

J. McCabe, for appellee.

YOUNGLOVE ET AL. v. FRANK.

PARTITION.—*Answer of Division Between Heirs.*—Suit by F. against Y. and wife for partition. Answer, by the wife, that the land in complaint mentioned, with other lands adjoining them, descended to the defendant and her brother R., from their father; that said brother and herself held all the lands as tenants in common, until during 1864, when, by agreement, part were sold, and the greater portion of the proceeds taken by R.; that on the 27th of February, 1868, she being, with said R., in possession of the lands, conveyed a portion to R., which was his full share, taking into account the money received by R. on sales of the other portions of the lands; that when the conveyance was made, she had no notice of the deed made by R. to the plaintiff, which was executed October 30th, 1865, and not recorded until March 28th, 1868; wherefore neither R. nor the plaintiff have any title to the land. *Held*, that the answer was not sufficient.

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APPEAL from the Hendricks Common Pleas.

PETTIT, J.—This suit was brought by James Frank, the appellee, against John E. Younglove and Virginia Younglove, his wife, and John F. Kimbly and Sarah Kimbly, his wife, for partition of real estate; and the complaint shows that Frank, the appellee, and Virginia and Sarah were tenants in common of certain lands described, and that each was entitled to one-third thereof, and prays for partition, etc. Virginia and Sarah answered separately, but their answers are duplicates of each other, and might properly have been joint, and we shall consider them as one. We need set out but one paragraph of Virginia's answer, for it is admitted by appellants' counsel, in his brief, that if the ruling of the court on the third paragraph of her answer was correct, then there is no error in the subsequent part of the record, and that the judgment and decree must be affirmed. The third paragraph is as follows:

“3. And said defendant, Virginia E. Younglove, for further and separate answer to the complaint, says that said plaintiff ought not to have and maintain his action for partition, because she says that the land in complaint mentioned, together with other lands adjoining them, were lands descended to this defendant and her sister and co-defendant, Sarah Kimbly, and one John W. Ray, their brother, from their father, James B. Ray, deceased; that said parties held said lands as tenants in common until during the year 1864, when, by consent of all three of said parties, a portion of the lands so held by them were sold and conveyed, and in 1865 and 1866 the greater portion of the proceeds were, by consent, received by said John W. Ray; that afterward, on the 27th day of February, 1868, and before she had any notice of the pretended deed by which the plaintiff claims title to any part of said lands, which deed was executed on the 30th day of October, 1865, and not recorded until March 28th, 1868, said defendants and said John W. Ray being all the time in possession of said lands, this defendant and her sister, together with their husbands, conveyed to said John W.

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Ray a portion of the lands of which they were joint owners, which were then supposed to be his full and equal share of all said lands, after taking into the account the amount of money received by said John W. Ray as the proceeds of the lands sold prior to that time; that the tract so conveyed was the full share of said John W. Ray in and to all of said lands. Wherefore she says that the lands described in said complaint are the lands of herself and her sister, Sarah Kimbly, and that neither said plaintiff nor said John W. Ray has any title or interest therein. Wherefore she demands that said petition be dismissed, and that the pretended deed of said plaintiff from John W. Ray be declared void as to this defendant; and she asks for general relief."

To this paragraph of the answer there was a demurrer for want of sufficient facts, which was sustained. Was this ruling warranted by law? We hold that it was. It admits that a deed was made by John W. Ray for one-third of the lands, placing the appellee in the same legal condition as said Ray occupied in relation to said lands, charging neither fraud, accident, nor mistake, nor that said Virginia was a subsequent purchaser from John W. Ray after his deed was made to Frank, and before it (Frank's deed) was recorded, nor does it allege that Virginia had been, or would be, injured by the facts therein stated. We hold that the answer was totally insufficient.

The judgment is affirmed, at the costs of the appellants.

L. M. Campbell, for appellants.

J. T. Dye and *A. C. Harris*, for appellee.

THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS RAILROAD
COMPANY *v.* ROSS.

RAILROAD.—*Injury to Animals.*—*Fencing.*—*Instruction.*—An instruction that when the owner of cattle turns them out, at a place where they must pass

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along a railway track, when trains are passing, he cannot recover for their injury, is erroneous as applied to a case where the road should be securely fenced, and is not so fenced.

APPEAL from the Shelby Circuit Court.

BUSKIRK, J.—The appellee sued the appellant before a justice of the peace, for killing and injuring the cattle of the appellee, by a locomotive and train of cars on the road of appellant. The complaint was in two paragraphs. The first being what is designated the statutory cause of action. The second charged that the injury was occasioned by the negligence of the servants of appellant, without fault on the part of the appellee.

The cause was tried before the justice, under the statutory denial, and resulted in a finding for the plaintiff, from which judgment the appellant appealed to the circuit court. The case was tried in the circuit court by a jury, and resulted in a finding for the plaintiff. The court overruled a motion for a new trial, and rendered judgment on the finding, to which ruling the appellant excepted. The appellant has assigned for error the overruling of the motion for a new trial. The appellee has assigned as a cross error the giving of the ninth instruction.

The appellant insists that the court erred in overruling the motion for a new trial, for the following reason:

“The evidence clearly shows that Ross knew, on the morning that his stock was killed, that two trains would pass down the road that morning, and that he also knew the time of the passing of the trains at that place; and knowing this, turned his cattle out, or suffered them to be turned out, before the trains had passed; and knowing that said cattle, in order to get away, would either have to go south one quarter of a mile to get off the track, or north the same distance.”

Upon the foregoing facts, it is maintained that the appellee, by his own carelessness and want of ordinary care, caused the injury to his cattle.

The ninth instruction was in these words:

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"If the owner or occupant of lands, upon and across which a railroad is built and operated, turns his stock upon, or in the immediate vicinity of such railroad track, along which trains are passing at specified times and seasons, which time is known to the owner of the stock, and such stock are killed or injured by contact with the train, the company are not liable, unless the evidence satisfies you that the employees upon the train are guilty of gross and wilful want of care."

The appellant, in support of his position, has referred to the following decisions of this court: *The Toledo and Wabash R. W. Co. v. Thomas*, 18 Ind. 215; *The Evansville and Crawfordsville R. R. Co. v. Lowdermilk*, 15 Ind. 120; *The Pres., etc., O. & M. R. R. Co. v. Gullett*, 15 Ind. 487; *The Evansville and Crawfordsville R. R. Co. v. Hiatt*, 17 Ind. 102; *Knight v. The Toledo and Wabash R. W. Co.*, 24 Ind. 402; *The Toledo and Wabash R. W. Co. v. Goddard*, 25 Ind. 185; *Sinram v. The P., Ft. W., & C. R. W. Co.*, 28 Ind. 244; *The Michigan S. and N. Ind. R. R. Co. v. Lantz*, 29 Ind. 528.

The evidence is in the record, from which it appears that the place where the cattle were killed and injured was not securely fenced by the appellant, and that the appellee mainly placed his right to recover on that ground, and not upon the negligence of the agents of the appellant. If the plaintiff was entitled to recover upon either ground, the court committed no error in overruling the motion for a new trial. When, as in this case, the plaintiff bases his right to recover on two separate and distinct grounds, the court should not give an instruction that would apply to the case in one aspect and not in the other, without informing the jury to which phase of the case it was applicable. The ninth instruction had some application to the issue formed on the second paragraph of the complaint, while it had none to the issue formed on the first paragraph. It seems to have been given as a general instruction, applicable alike to both paragraphs of the complaint. This was well calculated to confuse and mislead the jury. We shall consider together

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the error assigned by appellant and the cross error assigned by the appellee, as they involve the same question of law. If the instruction was correct, then the court erred in refusing a new trial. If the instruction was erroneous, as applied to the facts of the case, then the court committed no error in overruling the motion for a new trial.

In the further consideration of this case, we shall regard it as a proceeding under the statute for killing stock at a point where the railroad was required to be, but was not, securely fenced, and not an action at common law, based upon the negligence of the appellant; for the reason that if the plaintiff was entitled to recover under the first paragraph, it is wholly immaterial to inquire and determine whether he was so entitled under the second paragraph of the complaint.

We have examined all the cases referred to by the counsel, and find that none of them have any application to the case under consideration.

The case in 15 Ind. was for personal injuries, alleged to have been caused by the negligence of the employees of the railroad company.

The case in 18 Ind. was for killing stock at a point where the railroad was securely fenced, and the right to recover was placed upon the negligence of the agents of the railroad company.

The case in 17 Ind. was for personal injuries alleged to have been caused by the negligence of the employees of the railroad company.

In the case in 24 Ind., McKachan was the owner of a blind horse, and turned him out on the common, near the railroad track, along which trains were passing every few hours, and where the horse was liable to wander on the track, at any time, without the ordinary power of avoiding the danger of an approaching train. The court held that the plaintiff was guilty of gross negligence, amounting to a willingness to suffer the injury complained of, and was not entitled to recover. It does not directly appear from the

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opinion whether the horse was injured at a place where the company was not required to fence its track, but such is inferrible from the facts of the case, and the ground on which the opinion was based.

The case in 25 Ind. was for damages sustained by the plaintiff, by reason of a train of cars running over the wagon and horses of plaintiff.

The case in 28 Ind. was an action by the railroad company against the owner of cattle, who had knowingly permitted his cattle to run at large; and, by reason thereof, they had wandered on the railroad track and thrown a train of cars from the track, whereby the railroad company had been greatly damaged.

The case in 29 Ind. was an action at common law, to recover damages for the personal injuries received by the plaintiff, caused by the alleged negligence of the operatives of the railroad company.

Thus, it is shown that none of the cases relied upon have any application to the case under consideration; as the right to recover in each case depended upon the comparative negligence of the plaintiff and the defendant.

It has been so repeatedly decided by this court, that it ought now to be regarded "as settled and put at rest," that a railroad company is liable for stock killed or injured at a point where it is required to fence its track, and has not done so, without reference to the question of fault on the part of the plaintiff, or negligence on the part of the defendant.

See *Williams v. The N. A. & S. R. R. Co.*, 5 Ind. 111; *The Lafayette, etc., R. R. Co. v. Shriner*, 6 Ind. 141; *Smith v. T. & R. R. R. Co.*, 7 Ind. 553; *The I. & C. R. R. Co. v. Kinney*, 8 Ind. 402; *The I. & C. R. R. Co. v. Caldwell*, 9 Ind. 397; *The I. & C. R. R. Co. v. Townsend*, 10 Ind. 38; *The Mad. & Ind'polis R. R. Co. v. Kane*, 11 Ind. 375; *The I. & C. R. R. Co. v. Paramore*, 12 Ind. 406; *The N. A. & S. R. R. Co. v. Powell*, 13 Ind. 373; *The I. & C. R. R. Co. v. Means*, 14 Ind. 30; *The I., P. & C. R. R. Co. v. Williams*, 15 Ind. 486; *The I. & C. R. R. Co. v. Kercheval*, 16 Ind. 84; *The I., P. & C. R. R. Co. v.*

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We are clearly of the opinion that the ninth instruction was erroneous, as applied to the facts of this case, and should not have been given.

We are also of the opinion that under the issues, and upon the facts of the case, the appellant was liable without reference to the question of contributory negligence, and that, consequently, the court committed no error in overruling the motion for a new trial.

The judgment is affirmed, with costs.

E. H. Davis and *C. Wright*, for appellant.

B. F. Davis, *B. F. Love*, and *W. C. Nichols*, for appellee.

STREIGHT v. BELL.

MALICIOUS PROSECUTION.—*Defective Affidavit.*—In an action for malicious prosecution, the complaint was held not defective, even if the affidavit on which the defendant caused the plaintiff's arrest did not charge a crime, because in that case the defendant was a trespasser in causing the warrant to issue.

PRACTICE.—*Motion for New Trial.*—A motion for a new trial must point out the instruction given or refused, or the evidence admitted or rejected, upon which error in the ruling of the court is assigned.

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APPEAL from the Newton Common Pleas.

WORDEN, C. J.—This was an action by the appellee against the appellant for a malicious prosecution. Demurrer to the complaint overruled, and exception. Issue; trial by jury; verdict and judgment for the plaintiff for eighty-nine dollars, a new trial being refused the defendant.

The complaint was in three paragraphs. The demurrer, being to the entire complaint, and not separately to each paragraph, was correctly overruled, if any one paragraph was good. But we are of opinion that each paragraph was good. Each paragraph alleges that the defendant, maliciously and without probable cause, made certain affidavits, which are set out, and which attempt to charge the plaintiff with having procured money of the defendant with intent to defraud him, by means of false pretences as to the quality of corn in a certain crib which the plaintiff sold to the defendant, on which the defendant paid to the plaintiff the sum of one hundred dollars; and that the defendant procured to be issued by justices of the peace certain warrants on said affidavits for the arrest of the plaintiff, and caused him to be arrested thereon, and to be brought before said justices for examination; and that upon being thus brought before the justices, such proceedings took place that he was discharged.

The objections urged to the complaint are, that as the affidavits on which the prosecutions were based do not charge any crime against the plaintiff; and that as there was no examination before the justices of the merits, but the plaintiff was discharged because the justices deemed the respective affidavits insufficient, the action will not lie. These objections are not well taken. The affidavits are lengthy, and we will not extend this opinion by copying them here. They will add nothing valuable to the legal literature of the country. It is by no means clear that they did not, though in a loose and inartistic manner, sufficiently charge the crime to enable the justices to take cognizance thereof. But if they did not, then the defendant was a trespasser in causing the warrants to issue thereon, and causing

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the plaintiff to be arrested and taken before the magistrates for examination. In either view, the complaint contained a good cause of action. *Steel v. Williams*, 18 Ind. 161.

In *Hays v. Blizzard*, 30 Ind. 457, it was held, that the quashing of an indictment and the rendition of judgment thereon for the defendant sufficiently put an end to the prosecution to enable the defendant therein to maintain an action for malicious prosecution. The same principle must be applicable here. The discharge of the defendant in a prosecution, by the justice, because he deems the affidavit insufficient, ends the prosecution, and enables the defendant therein, if the prosecution was instituted maliciously and without probable cause, to maintain an action therefor.

There are no other questions raised except those arising on the motion for a new trial. The following are the reasons for a new trial, as they appear in the record:

"First, that the verdict of the jury is not sustained by sufficient evidence.

"Second, that the verdict of the jury is contrary to the law of the case.

"Third, that the court erred in giving charges No. —, as follows (see bill of exceptions at the close of this transcript), to the jury trying this cause, which were excepted to by the defendant at the time the same were given.

"Fourth, that the court erred in refusing to give charges No. — (see bill of exceptions), to the jury trying this cause as asked for by the defendant at the proper time.

"Fifth, that the court erred in modifying charges No. — (see bill of exceptions), asked for and insisted on by the defendant, and in giving said charges so modified to the jury over the objection of the defendant.

"Sixth, that the court erred in the trial of this cause in ruling out evidence offered by the defendant and embraced in questions asked certain witnesses on said trial included in No. — (see bill of exceptions).

"Seventh, that the court erred on the trial of this cause in

overruling objections made by the defendant to evidence offered by the plaintiff, No. — (see bill of exceptions).

“Eighth, that the court erred in overruling the demurrer filed by the defendant to the plaintiff’s complaint herein.”

The first and second reasons for a new trial brought the case in review before the court below, on the evidence; and we are not inclined to disturb the conclusion arrived at. There was certainly evidence that tended to make out all the points essential to a recovery. Indeed, we think it may be legitimately inferred from the evidence that the object of the defendant in prosecuting the criminal causes against the plaintiff was to coerce thereby repayment by him of the amount of money he had received beyond the value of the corn delivered by him.

The eighth reason is no reason whatever for a new trial. All the others, we think, are too indefinite to raise any question. We suppose the references to the bill of exceptions in the reasons for a new trial, in parentheses, as above set out, were not contained in the original reasons as filed, but were inserted by the clerk, in making out the transcript, in order to facilitate our search for the grounds upon which a new trial was asked. This is inferred from the fact that, at the time the reasons were filed, no bill of exceptions had been filed whatever.

The charges alluded to in reasons three, four, and five, with the numbers blank, and without any description whatever of those intended, could not be at all identified. There was nothing in these reasons to call the mind of the court to any particular charge or charges. We certainly could not, without other aid than a consultation of the reasons for a new trial in connection with the charges given and refused, determine what particular ones were meant in each instance.

The same thing may be said in reference to the admission and rejection of evidence, as specified in the sixth and seventh reasons. What particular evidence was supposed to have been improperly ruled out, or of what witnesses, does not appear; nor does it appear what evidence was sup-

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posed to have been improperly admitted, whether oral or documentary; or if oral, the witness whose testimony was admitted does not appear. In short, there was nothing in the reasons to identify, in the slightest degree, the evidence ruled out in the one instance, and given in the other, of which complaint was made.

The judgment below is affirmed, with costs and ten per cent. damages.

J. Wallace, B. F. Brown, B. F. Davis, and B. F. Loe, for appellant.

C. H. Test, D. V. Burns, and G. S. Wright, for appellee.

BAXTER v. KITCH, Administrator.

STATUTE OF FRAUDS.—*Agreement to Convey Land.*—A suit cannot be maintained by a husband on a verbal contract, by which land was to be conveyed as compensation for services rendered by his wife, for the value of the land, on failure to convey.

APPEAL from the Grant Common Pleas.

DOWNEY, J.—This was a claim filed by the appellant against the appellee, as administrator *de bonis non* of the estate of William Prickett, deceased, alleging that the deceased and Mary Prickett, his wife, made and entered into an agreement with said Thomas Baxter and Elizabeth Baxter, his wife, a copy of which is filed with the complaint, by which said Elizabeth Baxter, in consideration that said William Prickett and Mary Prickett would convey to said Elizabeth Baxter, by good and valid title, the following tract of land, then owned by said Mary, to wit, fifty acres, etc., agreed that the said Elizabeth would keep the said Mary Prickett during her lifetime, and board said Mary and make and mend her clothing, said Mary furnishing the goods

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and materials, and nurse and take good care of her during her lifetime.

It is further stated that in pursuance of the agreement, the said Elizabeth Baxter and Thomas Baxter, her husband, did take care of, nurse, maintain, and provide for said Mary Prickett, who was old, sick, and unable to take care of herself, according to the terms and conditions of said agreement, until two months before her death, in February, 1864, at which time said Mary left the plaintiff and his wife, and refused to allow them to comply with the terms and condition of said agreement; that they were ready to fulfil their contract by keeping her until her death. It is averred that the land at the time the contract was made was of the value of two thousand dollars; that instead of said William and Mary Prickett making to said Elizabeth Baxter a good and valid deed for said land, they wholly failed and refused, and each made a pretended deed, which was held by the judgment of the Grant Circuit Court to be invalid, and to convey no estate whatever. It is then charged that said William Prickett received means, property, notes, and money that belonged to his said wife, one hundred dollars, which he never paid over or accounted for. Judgment is demanded for the price of the said land so to have been conveyed, two thousand dollars. The written contract or agreement which is referred to in the complaint is as follows:

“Know all men by these presents that we, Elizabeth Baxter and Thomas Baxter, her husband, of Grant county, in the State of Indiana, convey and warrant to Mary Prickett, her heirs and assigns of Grant county, in the State of Indiana, for the sum of two thousand dollars, the following real estate in Grant county,” etc., describing the land; “Provided, always, and these presents are upon this express condition: Whereas said Elizabeth Baxter has undertaken and agreed to keep the said Mary Prickett during her lifetime, and Elizabeth Baxter is to board said Mary Prickett, and is to wash, make, and mend the said Mary Prickett’s clothing during the said Mary Prickett’s natural lifetime, the said

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Mary Prickett is to furnish the materials and goods for her own clothing, said Elizabeth Baxter is to nurse and take good care of the said Mary Prickett during her natural lifetime. Now, if the said Elizabeth Baxter shall faithfully perform all the duties required of her as set forth in this agreement, or cause the same to be done, then this obligation is to be void and of no effect; otherwise, upon the failure of said Elizabeth Baxter to fully comply with this, her obligation, then this agreement to be in full force and virtue in law. In witness whereof," etc., "this 4th day of November, 1862.

her
"ELIZABETH + BAXTER,
mark.
"THOMAS BAXTER."

Copies of the inoperative separate deeds of Mary Prickett and William Prickett, mentioned in the complaint, are filed with the complaint. They each describe the same lands mentioned in the instrument filed with the complaint. That of Mary Prickett is dated November 4th, 1862, and that of William Prickett is dated the 27th day of October, 1862, and they are each executed to Elizabeth Baxter alone.

The defendant demurred to the complaint, because, first, it did not state facts sufficient to constitute a cause of action; and, second, there was a defect of parties plaintiffs. This demurrer was sustained by the court; the plaintiff excepted; and, refusing to amend, judgment was rendered for the defendant.

The plaintiff appealed, and has assigned errors in this court as follows: First, in sustaining the demurrer to the complaint; and, second, in rendering judgment for the defendant, instead of for the plaintiff.

This is the third time that this case, or cases relating to the same transactions, have been in this court. In *Baxter v. Bodkin*, 25 Ind. 172, the separate deeds of Prickett and his wife to Elizabeth Baxter were held invalid, on the ground that such separate deeds could convey no interest in the lands of the wife. Then in *Baxter v. Prickett's Administrator*, 27 Ind. 490, it was held that Mrs. Baxter could maintain

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no action for the services rendered by her in taking care of Mrs. Prickett; that the right of action, if any, was in the husband, and not in the wife; that the earnings of the latter belonged to the former, as at common law—our statute having made no change in this respect.

The question now presented is, whether the husband, Thomas Baxter, can maintain this action on the special contract set up in the complaint, and recover upon it as a valid and binding contract. It will be seen that the action is not brought to recover the value of the services rendered by the wife of the plaintiff in taking care of the wife of the decedent, William Prickett; but it is based on the special contract, and for the recovery of two thousand dollars, the value of the land, which it is alleged the deceased and his wife agreed to convey, but which they failed to convey on account of the invalidity of the separate deeds which they executed. The value of the services rendered by the wife of the plaintiff, to and for the wife of the deceased, is not alleged. The complaint cannot be construed into a claim for the value of such services. It is based on the special contract, and nothing else. If it cannot be sustained in that character, it cannot be sustained at all.

We are of the opinion that the special contract is within the statute of frauds, and therefore invalid, because it is not in writing. It is a contract for the sale of real estate; and, to be made a sufficient foundation of the action, must have been in writing and signed by William Prickett, the deceased. The written contract, a copy of which is filed with the complaint, is nothing more than a mortgage, and it is not signed by the deceased, nor was he in any way a party to it. It was executed by Baxter and wife to Mary Prickett. 1 G. & H. 348, section 1, clause fourth; *Hadden v. Johnson*, 7 Ind. 394; *M'Clure v. M'Cormick*, 5 Blackf. 129; *Thompson v. Elliott*, 28 Ind. 55.

The judgment is affirmed, with costs.

J. Brownlee and *H. Brownlee*, for appellant.

I. Van Devanter, for appellee.

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Held, that he could not defend against the payment of the claims included

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17. *Pleading.—Joint Liability.—Former Recovery.*—Where suit had been brought upon the notes and mortgage against the maker of the notes and the member of the firm in whose individual name the mortgage was executed, and judgment only of foreclosure taken against the member of the firm and a personal judgment

- against the maker of the notes; *Held*, that, as judgment on the agreement to pay the notes might have been taken against the partner in that action, the proceedings and judgment taken were a bar to any further suit against him on the contract, and therefore a bar to any suit against his partners, who were only liable jointly with him.....*Ibid.*
18. *Construction.*—A contract that if certain improvements are sold for five thousand dollars, B. is to have four hundred dollars, or in proportion if for a less sum, and if the works and machinery constituting the improvements are started again and are successful, A. is to have the same amount, but if unsuccessful, nothing, will entitle A. to a proportion, if the improvements are sold after an unsuccessful attempt to run them. *McKernan v. Collins*.....376

CONVEYANCE.

See HUSBAND AND WIFE, 5 to 9.

1. *Construction.*—A conveyance of a lot to A., for the use of the Catholic congregation of the city of Aurora, called "St. Mary's," to have and to hold said premises, etc., for the use of said congregation or their assigns forever, conveys an indefeasible title in fee simple. *Schipper v. St. Palais et al.*.....505
2. *Estoppel.*—A church building was erected upon a lot thus conveyed, and after the use of the building for years for worship, the building was removed, and the use of the lot for church purposes was abandoned, and while a suit by the grantor was pending to have the deed of conveyance corrected on the ground of mistake in drafting, so as to limit its exclusive use to church purposes, and demanding a forfeiture of the lot to the grantor on account of such abandonment, the grantor took a contract to grade the street in front of said lot, under an ordinance of the city, and made an affidavit to secure the issuing of a precept for the collection of an assessment against the owner of the lot, and in said affidavit alleged that A. was the owner thereof; whereupon A. paid said assessment. *Held*, that the grantor was not estopped by such affidavit from prosecuting

his suit for the recovery of said lot
against A.....*Ibid.*

CORPORATION.

See CITY; DRAINING ASSOCIATION;
TOWN.

COUNTY AUDITOR.

1. *Delinquent List.*—The county auditor has power to make a contract for the publication of the delinquent taxes; and where such contract is made, although the publication be not in time, yet if this results not from fault in the publisher, he is entitled to recover from the county on his contract. *Foy et al. v. The B'd of Comm'rs of Ripley Co.*.....347
2. *Per cent. on School Fund.*—Where a county auditor performs duties in the management of the school funds, and the apportionment cannot be made until his successor takes the office, he is entitled to a proportionate amount of the per cent. allowed on the disbursement of the funds. *Wright v. McGinnis*.....421

COUNTY CLERK.

See FEES AND SALARIES, 2, 3.

COUNTY COMMISSIONERS.

See LIQUOR LAW.

1. *Appeal.*—One who is not a party to proceedings before the board of county commissioners cannot appeal from a decision of such board, unless he shall file in the office of the county auditor his affidavit, showing that he has an interest in the matter decided, and that he is aggrieved by such decision. If such an affidavit has not been filed, the court may dismiss the appeal. *Robinson v. The Board of Comm'rs of Vanderburg Co.*..... 333
2. *Same.—Statute Construed.*—The phrase, "a party to the proceedings," as used in the statute, 1 G. & H. 253, section 31, embraces such persons only as are parties in a legal sense, and who have been made or become such in some mode prescribed or recognized by the law, so that they are bound by the proceeding....*Ibid.*

COUNTY TREASURER.

See FEES AND SALARIES, 2; TAX, 1, 3

COVENANT.

See VENDOR AND PURCHASER, 1, 2.

CRIMINAL LAW.

See HUSBAND AND WIFE, 4; NEW TRIAL, 5.

1. *Murder.—Possession of Weapons by Deceased.—Proof of Threats by Deceased.*—On a trial for murder, in which the witnesses for the defence had testified that the deceased had a bowie-knife in his possession the night of the murder, and the State had introduced evidence to show that he had no such knife, and the defendant proposed to prove threats made by the deceased when the knife was exhibited, and also when it was not shown, against the life of the prisoner, or of injury to him, some of which threats were not shown to have come to the prisoner's knowledge;

Held, that evidence of the possession of the knife by the deceased a short time before the date of the occurrence which resulted in his death, was proper for the consideration of the jury, and also evidence of the threats made by the deceased, whether known to the defendant or not, and either when exhibiting the knife or at other times. *Holler v. The State*.....51

2. *Obstructing Railroad Track.*—Section sixty-six of the "act defining misdemeanors and prescribing punishment therefor," 2 G. & H. 475, does not repeal section twenty-nine of the "act defining felonies and prescribing punishment therefor." 2 G. & H. 446. *Coghill v. The State*.....111

3. *Murder.—Bail.*—Under an indictment for murder in the first degree, where the evidence was heard on an application to let to bail, the judges of the Supreme Court were equally divided in opinion whether the offence was, under the evidence, bailable or not. *Ex parte Proctor*.174

4. *Practice.—Bill of Exceptions.*—A bill of exceptions was signed and

filed in a criminal case, after the close of the term, without leave having been granted during the term for an extension of time.

Held, that the bill of exceptions formed no part of the record, even if time beyond the term, in which to file the bill, could have been given.

The State v. Jones.....179

5. *Murder.—Manslaughter.—Use of Deadly Weapon.—Malice.—Instruction.*—On a trial for murder, where there were some circumstances strongly tending to the conclusion that the crime was murder, and not manslaughter merely; such as the use of a deadly weapon by the defendant, in a manner seemingly cruel and not justified by the danger of the supposed assault by the deceased, and the following the deceased and inflicting upon him a blow with a knife after he had turned and was retreating; and, on the other hand, there were some circumstances that tended in some degree to modify such conclusion; as that the defendant was smarting under indignities inflicted upon him by the deceased, who a short time before had assaulted and chased defendant with a stable fork through the public streets, until he took refuge; and the deceased had also applied to the accused degrading and humiliating epithets.

Held, that a charge to the jury, which, after defining manslaughter as an unlawful killing without malice express or implied, stated, that "if a man use a deadly weapon in killing his adversary, the law implies malice from its use, except where the killing is excusable," was in effect telling the jury, that there was no such thing as manslaughter, where a deadly weapon was used, as the implied malice made it murder, if it was not excusable; and that the charge was erroneous. *Miller v. The State*..432

6. *Same.—Mortal Wounds.—Malice.* Where there was doubt as to which of the blows was mortal, this instruction should have been given as requested: "If the blows which caused the death of" A., the deceased, "were given in self-defence, and other blows were afterward given, which were not given in self-defence, not mortal, you should find the defendant not guilty.".....*Ibid.*

D

DAMAGES.

See BASTARDY, 3; CONTRACT, 6.

Measure of. See VENDOR AND PURCHASER, 2.

DECEDENTS' ESTATES.

1. *Creditor.*—A creditor of a decedent's estate must proceed to enforce his claim against the estate through an executor or administrator, and cannot sue the heirs, devisees, and legatees, where there has been no administration. *Wilson et al. v. Davis et al.*.....141

2. *Executor de Son Tort.—Liability.*—If any one has, without an administration, though he be a legatee under a will, taken possession of any of the property of a decedent, he may be sued as an executor *de son tort*, by an unpaid creditor*Ibid.*

3. *Appeal.*—Section 189 of the act for the settlement of decedents' estates is in force, except so far as it authorizes a writ of error. The party aggrieved has his election to appeal from the common pleas court to the circuit court, in any matter connected with the decedent's estate, or under section 550 of the code, to the Supreme Court. If appealed to the circuit court, the case is tried *de novo*, and if there are issues of fact, they may be tried by a jury. *Hamlyn et ux. v. Nesbit, Adm'r*.....284

4. *Trial.—Burden of Issue.*—Where the administrator had reported, and exceptions were taken to his report, and the administrator charged that the decedent had made unequal advancements to the heirs, and this was denied, and an appeal was taken to the circuit court;

Held, that the administrator was entitled to have the open and close on the trial.....*Ibid.*

5. *Witness.—Evidence.*—The administrator is a competent witness on such trial. The wife of one of the co-plaintiffs, the real party in interest, cannot be a witness. Nor can the declarations of the ancestor, made long after the supposed payment or advancements to his children, be proved for the purpose of establish-

ing the fact that such payments or advancements were made.....*Ibid.*

6. *Administrator.—Removal.—Practice.*—In a proceeding to remove an administrator on the ground that he has failed to make a true and complete inventory of the estate of the decedent, no other pleadings are authorized than the sworn application. The only judgment the court can render is one removing or refusing to remove. The statute is simply mandatory, and the action of the court on the application is very much within the discretion of the judge. *Williams v. Tobias, Adm'r*.....345

DEDICATION.

1. *City.—Improvement of Alley.—Injunction.—Pleading.*—Where an injunction was sought to restrain the city of Evansville from improving what was claimed by the city as an alley, it was answered, that the owners of the property, subject to the plaintiff's life estate, on both sides of the alley, had laid out and opened the same to correspond with the other alleys of the city, with the consent of the plaintiff, and, in 1858, had laid off lots on their grounds abutting on said alley, and described said lots as extending to the same, in deeds and conveyances; and that, with full knowledge of the plaintiff and the owners, said alley had been used by the public, exclusive of the use by the owners.
Held, that the answer was sufficient as showing a dedication to the public use; and that such facts could not be introduced under the denial, but must be averred by answer. *The City of Evansville et al. v. Evans*. 229
2. *Same.—Lapse of Time.*—Dedication of property to a highway may be shown by acts *in pais*, and lapse of time is not important under such circumstances.....*Ibid.*

DEMAND.

See OFFICIAL BOND, 1.

DEMURRER.

See JURISDICTION, 5; NEW TRIAL, 4; PRACTICE, 19.

1. *Duplicity not Demurrable.*—Duplicity in a pleading cannot be presented by a demurrer. *Denman v. McMahon, Adm'r*..... 241
2. *To Answer.*—A demurrer to an answer for want of sufficient facts tests the sufficiency of the complaint.—*Lytle v. Lytle et al.*.....281
3. *Pleading.*—Where a complaint contains one good paragraph, a demurrer to the whole complaint should be overruled. *The J., M. & I. R. R. Co. v. Cox*..... 325

DEPOSITION.

See EVIDENCE, 3.

DESCENT.

1. *Statute.—Sections 23, 18, 22, and 15.*—Where the father of A. died intestate, the owner of certain real estate, leaving him and his mother the only heirs, and the mother afterward married B., by whom she had one child, and died, leaving her husband and said child and A. surviving;
Held, that A. took the entire real estate of which his father died seized. *Mathers v. Scott*.....303
2. *Same.—Sixth Section.*—A. and his wife conveyed lands to B. and his wife, the consideration being natural love and affection, the wife of B. being the daughter of the grantors. B. and wife had two children. The wife died; and B. married again, and had five children by his second wife; and B. died.
Held, that, on the death of B., the seven children inherited equally. *Barnes v. Loyd et al.*.....523

DIVORCE.

1. *Custody of Children.*—In granting a divorce, the court has the power to decree the custody of the minor children, or any of them, to the party most suitable, considering the sex and age of the children and qualification of the parties. *Bush v. Bush*.....164
2. *Provision for Children.*—It is the duty of the court on granting a divorce, where there is property, to make reasonable provision for the

care and custody of any children of the marriage.....*Ibid.*

3. *Alimony*.—Where there is an estate of twenty thousand dollars, accumulated during the marriage by the joint efforts of husband and wife, a fourth in value given to the wife is not unreasonable, where the divorce is granted for the misconduct of the husband.....*Ibid.*

DOWER.

See HUSBAND AND WIFE, 2.

DRAINING ASSOCIATION.

1. *Liability of Members*.—*Judgment*.

Where the members of a draining corporation were sued, with the corporation, for a liability incurred by the company, and the individual members composing the corporation demurred to the complaint, and the demurrer was overruled, and judgment was rendered against the defendants, to be first collected of the assets of the corporation;

Held, that the members of the corporation could not complain of the ruling, as they were not injured thereby, even if their liability was only contingent and secondary. *The Marion T'p Un. Draining Co. et al. v. Norris et al.*.....424

2. *Same*.—*Answer*.—*Execution*.—

Where the complaint alleged that the corporation had no assets subject to execution, an answer that it had a schedule of assessment of benefits upon land and real estate affected by the construction of its work, duly recorded, etc., exceeding the amount of its liability, was no defence, as such assessments are not subject to an ordinary execution.....*Ibid.*

DRUNKENNESS.

1. *Contract*.—*Ratification*.—In a suit upon a mortgage, it is a good defence, that the defendant was so intoxicated, at the time of signing the same, as to be incapable of executing it; and a reply that he retained the goods for which the instrument was given, and used them, is bad, as the action is not on a claim for goods sold, but on the written promise, and the reply

shows no ratification of that act.

Reinskopf et al. v. Rogge et al.....207

2. *Same*.—*Instruction*.—In such case, an instruction to the jury, that “if the defendant, at the time of the execution of the mortgage, as a result of drunkenness, or any other diseased condition of the mind, was deprived of his understanding, so that he had not sufficient capacity to act with discretion in the ordinary affairs of life, the plaintiff cannot recover,” is a correct statement of the law....*Ibid.*

DUPLICITY.

See DEMURRER, 1.

E

ELECTION.

See TOWN.

1. *Contest of Election*.—*Notice of Contest*.—In proceedings for the contest of an election to a county office,

a copy of the statement of contest and notice must be served by the sheriff by delivering to the contestee a copy of the notice and statement of contest, or by leaving a copy thereof at his last usual place of residence. *The State, ex rel. Combs, v. Hudson*.....198

2. *Same*.—*Return of Service*.—A return upon the notice issued in such case, as follows: “Served on the within named” A. B., “by reading and delivering to him a copy of the order,” is insufficient to show the service required by the statute...*Ibid.*

ESCAPE.

1. *Bastardy*.—*Judgment against Sheriff*.—*Rearrest*.—Where a defendant in a bastardy suit is imprisoned for a failure to pay or replevy

a judgment rendered against him in such suit, and escapes without the consent of the sheriff, and is not recaptured for three months thereafter, and judgment is recovered against the sheriff, on his bond, for the escape, by the relatrix in the original suit, and the judgment is not paid, the defendant cannot be recaptured and imprisoned. *Ex parte Volts*...175

2. Where in a proceeding in bastardy the defendant is adjudged to pay a certain sum, and is held in custody for failure to pay or replevy the same, and without the consent of the sheriff forcibly and unlawfully escapes from the jail, and the sheriff is sued for the escape, and suffers judgment, and pays the sum adjudged against the defendant, he may again arrest the defendant and hold him in jail in execution of the original judgment. *Ex parte Voltz*.....237

ESTOPPEL.

See CONVEYANCE, 2.

EVIDENCE.

See BASTARDY, 2; CRIMINAL LAW, 1; CONTRACT, 6, 7; DECEDENTS' ESTATES, 5; LIBEL, 3; OFFICIAL BOND, 2; PLEADING, 3, 4; PRACTICE, 5; PROMISSORY NOTE, 5, 6; SUPREME COURT, 1; TRUST, 1; VENDOR AND PURCHASER, 1.

1. *Impeachment of Rebutting Witness.* Although a witness has been cross examined, on his original examination by the State, yet, if he is again introduced by the State and examined in rebutting, it is proper to lay the foundation then for his impeachment upon any evidence then given for the State, and to subsequently introduce witnesses for that purpose. *Holler v. The State*.....57
2. *Hearsay.*—The declarations of a person upon whom an order for the delivery of goods is given are not evidence against the maker of the order. *Shirts v. Irons*.....98
3. *Deposition.—When Used.*—When the deposition of a witness, who does not reside in the county of the trial, or in an adjoining county, has been taken by one party, the fact that the other party has had the witness present and has examined him during the trial, does not prevent the reading of the deposition, if the witness be not present when it is offered, having been discharged by the party who procured his attendance.....*Ibid.*
4. *Explanation of Delivery of Draft.* Evidence to explain under what circumstances a draft on one officer of a railroad company was accepted by

another officer of the same company, and delivered to the plaintiff having an account against the company, is admissible, there being an averment in the complaint that the draft was not delivered or received as payment. Such evidence does not contradict the tenor of the draft. *The C., C. & L. R. R. Co. v. West*....211

5. *Admissions.*—Admissions are not regarded as the strongest and most satisfactory evidence. *Denman v. McMahon, Adm'r*.....241
6. *Same.*—The admissions of a party may be given in evidence against him, whether connected with any act done or not. These declarations cannot be introduced in his favor.....*Ibid.*
7. *Proof in Part.*—Where it is necessary for the defendant to show the payment of taxes by him, the admission of a tax receipt is proper, although it does not show who paid the money, as this proof may be supplied by other evidence.....*Ibid.*
8. *Appeal.—Justice of the Peace.*—In a suit on a premium note given for a policy of insurance, evidence of the want of consideration may be given under the denial put in by the statute, on trial in the court of common pleas, on an appeal from a justice of the peace. *Heller, Receiver, v. Crawford*.....279
9. *Same.—Declarations of Agent.*—In such action, the declarations of the agent, made at the time of making the contract, and relating thereto, are admissible in evidence against the insurance company.....*Ibid.*
10. *Set-off.—Rebutting Evidence.*—Where a defendant in an action has introduced proof of a set-off, and the plaintiff introduces new matter in evidence in avoidance, the defendant has the same right to introduce rebutting proof, that he would have in an action on the matter pleaded as set-off. *Basye v. Goodman*.....331
11. *Attorney.—Admissions.*—In a suit by an attorney for his services, it is proper for him to testify as a witness to admissions made by the defendants, as to the amount realized by his successful defence of the action in which he was employed by them. *McNiel et al. v. Davidson*.....336
12. *Same.—Opinions.*—There is no error in excluding evidence of a witness as to the value of services

rendered by an attorney in a case, from his knowledge of what the services were, when he has stated that he cannot say what a reasonable fee would be; nor is it error to exclude such testimony, when it has not been shown that the witness offered is competent to state such value. Other persons, having knowledge on the subject, are competent witnesses, as well as lawyers. But a mere opinion is not evidence. There must be knowledge of facts which will give value to the opinion.....*Ibid.*

13. *Jury.—Value.—Conflicting Evidence.*—A jury need not fix the value of personal property at the exact sum testified to by any one witness or by any two, but may find an intermediate sum. *The J., M. & I. R. R. Co. v. Tull*.....341

14. *Immaterial Evidence.*—The admission of evidence that is only immaterial cannot affect a judgment which is correctly rendered upon the material evidence in the cause. *Parmlee et al. v. Sloan et al.*.....469

15. *Written Contract.—Parol Evidence.*—Where a contract of purchase is reduced to writing, and contains no warranty, one cannot be proved by parol. *Johnson v. McCabe et al.*.....535

EXCEPTIONS.

See PRACTICE, 12.

EXECUTION.

See DRAINING ASSOCIATION, 2; HUSBAND AND WIFE, 7; TAX, 1.

EXECUTOR AND ADMINISTRATOR.

See DECEDENTS' ESTATES.

EXECUTOR DE SON TORT.

See DECEDENTS' ESTATES, 2.

EXHIBIT.

See PLEADING, 2.

F

FEEs AND SALARIES.

1. *Statute.—Constitutional Law.—*

The act known as the "Fee and Salary Law," Acts 1871, p. 25, is not, as an entire act, invalid. *Wallace v. The B'd of Comm'rs of Marion Co.*.....383

2. *Same.—Payment of Fees into County Treasury.*—The members of the court were equally divided in opinion as to the constitutionality of that portion of the law which requires the clerk and sheriff to pay over their fees to the county treasurer.....*Ibid.*

3. *County Clerk.*—The clerk is entitled to tax and collect fees "for indexing," "for jury fees," and "for docket fees," under the fee and salary act of February 21st, 1871. *Geisel v. Taylor et al.*.....390

4. *Statute.*—Section ten of the act of February 21st, 1871, known as the fee and salary law, is constitutional. *Hyland v. The Water Works Co. of Indianapolis et al.*.....523

FENCE.

See RAILROAD, 1, 2, 3, 4.

FORMER RECOVERY.

See CONTRACT, 17.

FRAUD.

See CONTRACT, 1 to 11; HUSBAND AND WIFE, 7; PRACTICE, 6; PRINCIPAL AND SURETY, 1; PROMISSORY NOTE, 8.

1. *Fraud in Consideration.—Answer.* To an action on a promissory note the defendant answered, that he had purchased a farm, in the year 1858, from the plaintiff, and had executed his note for eight thousand dollars, payable in twenty years, with interest yearly, receiving a title bond; that finding he had been deceived in the quality of the land and was unable to pay the interest in full, the plaintiff promised him that if he would make certain improvements thereon, greatly enhancing the value of the farm, on final settlement he should be allowed a deduction on the contract price; that in 1868 the plaintiff informed him that he could sell the farm for seven thousand five hundred dollars, which was all he could realize for it, and if the defendant would

execute his four notes, payable yearly, for one hundred and twenty-five dollars each, and surrender the title bond, he, the plaintiff, would remit the interest due, some one thousand two hundred and sixty dollars, and return the note for eight thousand dollars; that relying on the statement that seven thousand five hundred dollars was all the plaintiff could realize for the land, he did execute the four notes, one of which is the note in suit, and surrendered his title bond for the land, and received the credit for the interest, and also his note for eight thousand dollars; and he says that when the plaintiff made the false and fraudulent statements on which he, defendant, acted in making the surrender of his bond, the plaintiff had already, without his knowledge, contracted the sale of the land for fourteen thousand five hundred dollars, and has since conveyed the same and received the money; wherefore he asks the cancellation of the four notes, and damages.

Held, that this was a good defence to the action on the notes. *Schofield v. Holland*.....220

2. *Fraudulent Conveyance.—Dismissal.—New Trial, as of Right.—Demand of Judgment.—Reasons for New Trial.*—A. purchased from the State a piece of land and received a certificate from the sinking fund commissioners, entitling him to a deed at the end of five years, on payment of interest yearly in advance, and the principal of the purchase-money at that date. A. assigned said certificate of purchase to B., executing and acknowledging an instrument reciting the assignment, and that he had also executed a note for a certain sum to B., payable in two years, and upon failure to pay the same at maturity, the title to the land described in the certificate was to vest in B. and become absolute. A. was to pay all taxes and the interest on the sum due the sinking fund. A. neglected to pay the interest, and the land was again sold by the sinking fund commissioners, and purchased by, and a deed taken to A.'s wife, who had full knowledge of all the facts. B. filed a complaint against A. and wife. The first two paragraphs were to have the conveyance to the wife.

set aside as fraudulent and the lien enforced; the third paragraph was to quiet the plaintiff's title to the land; and the fourth was for its recovery. After the evidence was concluded and the charge of the court given to the jury, but before they retired, the plaintiff dismissed as to the third and fourth paragraphs of the complaint. The finding was for the plaintiff.

Held, that the facts stated constituted a cause of action.

Held, also, that the plaintiff had a right to dismiss as to any paragraphs.

Held, also, that the defendant was not entitled to a new trial as a matter of right. Such new trial may be claimed in actions for quieting title, or for the recovery of real estate, but cannot be demanded in a trial to set aside a conveyance as fraudulent and subject the property to sale or in an action for the specific performance of a contract regarding real estate.

Held, also, that the prayer for relief under all the paragraphs could not enlarge the allegations of the complaint as left to the jury, and the court would grant the proper remedy.

Held, also, that the reasons for a new trial urged in this court must correspond with the causes stated below.

Held, also, that the reasons for a new trial, that the court erred "in admitting evidence improperly, which was objected to by the defendants at the time," and "in refusing evidence offered by defendants, which was accepted to at the time," were too general. *Truitt et ux. v. Truitt*.....514

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

G

GRAVEL ROAD.

See TURNPIKE.

GUARANTEE.

See PRINCIPAL AND SURETY, 1.

H

HIGHWAY.

See RAILROAD, 2.

HUSBAND AND WIFE.

See DESCENT, 2; WILL, 4.
Witness. See DECEDENTS' ESTATES, 5.

1. *Married Woman.—Indorsement of Note.*—A married woman may, with the consent of her husband, transfer her title to a promissory note, and for that purpose may indorse such note, but she cannot bind herself by the contract to a liability on the note. *Moreau et ux. v. Branson*.....195
2. *Mortgage. — Widow. — Dower.* — Where a husband mortgaged land (his wife not joining) on the 12th day of January, 1853, and in 1856 the mortgage was foreclosed, and the husband died in 1859, the wife had no interest in the land, dower having been abolished after the execution of the mortgage, with no saving clause for this class of cases. *Hoskins v. Hutchings et al*.....324
3. *Agent.—Liability of Husband.*—Where a wife engages in business, with the knowledge and consent of her husband, the business is regarded as that of the husband, and the wife is regarded as his agent, and he is bound for the performance of contracts which she may make relating to such business; but where the wife incurs the indebtedness, and the credit is given to her exclusively, and there can, therefore, be no presumption that she was acting as the agent of the husband merely, the husband is not liable. *Jenkins, Assignee, v. Flinn*.....349
4. *Witness.—Criminal Law.—Affidavit.*—In a prosecution under the act of February 23d, 1859, for carrying concealed weapons, the wife of the defendant cannot be a witness against him; and therefore a wife cannot make an affidavit against her husband on which to found such a prosecution. *Taulman v. The State*.
353
5. *Conveyance.—Estates by Entireties.* A husband and wife, though not thus described in a deed of conveyance of real estate executed to them, take under such deed as tenants by entireties. *Chandler v. Cheney*.....391
6. *Same.—Tenants by Entireties and Joint Tenants.—Distinction.*—The same difference which existed at common law between joint tenants and

tenants by entireties continues under our statute. In both the title and estate are joint, and both have the quality of survivorship; but the marked difference between the two is this: in a joint tenancy, either tenant may convey his share to a co-tenant, or to a stranger, who thereby becomes tenant in common with the other co-tenant; while neither tenant by the entirety can convey his or her interest so as to affect their joint use of the property during their joint lives, or to defeat the right of survivorship upon the death of either of the co-tenants. There may also be partition between joint tenants, but not between tenants by entireties.....*Ibid.*

7. *Same. — Execution. — Fraud.* — While such an estate exists, no interest in it can be sold on execution for the debts of the husband or wife, but the conveyance creating it may be set aside for fraud.....*Ibid.*
8. *Same.—Essentials.*—From the nature of the estate and the legal relation of the parties, there must be unity of estate, unity of possession, unity of control, and unity in conveying or incumbering it.....*Ibid.*
9. *Same.—Mortgage by Husband.*—A mortgage upon such an estate executed by the husband alone is void. *Ibid.*
10. *Married Woman.—Real Estate.* A married woman may, during coverture under her third marriage, maintain an action for the recovery of real estate which came to her on the death of her first husband, by descent from him, and which she attempted to convey during coverture under her second marriage. *Knight et al. v. McDonald et al*.....463

I

INJUNCTION.

See DEDICATION, 1; JURISDICTION, 1; TOWN; TURNPIKE.

INSANITY.

See DRUNKENNESS, 1, 2; PRACTICE, 8; WILL, 1.

INSTRUCTIONS TO JURY.

Exceptions. See PRACTICE, 12.

INSURANCE.

See EVIDENCE, 8, 9; SUNDAY.

INTERROGATORIES TO JURY.

Relevancy.—Interrogatories to a jury should be relevant to the matter in controversy. *Denman v. McMahon, Adm'r*241

INTOXICATION.

See DRUNKENNESS.

J

JOINT AND SEVERAL.

See CONTRACT, 16, 17.

JOINT TENANCY.

See HUSBAND AND WIFE, 6.

JUDGE.

Special Appointment.—Appeal.—Although the record shows that three different judges successively sat during the making of the issues and trial of a cause, without any evidence in the record of their appointment, the question as to their qualification cannot be raised for the first time on appeal. *Winterrowd et al. v. Messick*.....122

JUDICIAL SALE.

See MISTAKE.

JUDGMENT.

See DRAINING ASSOCIATION, 1; OFFICIAL BOND, 3; PLEADING, 2; PRACTICE, 4, 6, 7.

Arrest of. See JURISDICTION, 6.

Suit on.—Presumption of Defendant's Appearance.—In a suit upon a judgment for alimony in a divorce proceeding, the appearance of the judgment defendant in said proceeding for a divorce will be presumed until the contrary appear. *Lytle v. Lytle et al.*.....281

JURISDICTION.

See JUDGMENT; JUSTICE OF THE PEACE; RES ADJUDICATA, 2.

1. *Judgment.—Injunction.*—Where a resident of this State is sued out of his county, before a justice of the peace, and process by summons is served upon him, and judgment is rendered against him without an appearance, an injunction will lie to stay proceedings under the judgment. *Grass v. Hess et al.*.....193

2. *Justice of the Peace.—Appearance. Waiver.*—Where a defendant appeared before a justice having jurisdiction of the subject-matter of the action, and agreed upon a day for the trial, and subsequently filed an affidavit before the justice for a change of venue, which was granted to a justice of another township;

Held, that he could not plead to the jurisdiction of the justice to whom the cause was sent, over his person, on the ground that he was not a resident of the township in which the justice before whom the cause of action was brought exercised jurisdiction. *Nesbit v. Long*.....300

3. *Statute Construed.*—Section 28 of the code (2 G. & H. 56) is a statute defining jurisdiction, and not venue, and an action for injury to real property must be brought in the county where the real estate is situated. *Loeb et al. v. Mathis*.....306

4. *Supreme Court.*—If a court has no jurisdiction, there is no trial, and the Supreme Court will not look to the record to see whether the merits of the cause were fairly tried.....*Ibid.*

5. *Same.*—Under section 54 of the code (2 G. & H. 81) an objection to the jurisdiction of the court over the subject-matter of the action is not waived by failing to demur or answer. (FRAZER, J., dissented.)
Ibid.

6. *Arrest of Judgment.*—Such objection may be raised on a motion in arrest of judgment.....*Ibid.*

JURY.

See PRACTICE, 20.

JUSTICE OF THE PEACE.

See APPEAL; EVIDENCE, 8; JURISDICTION, 2.

Disqualified.—Jurisdiction.—A judgment was obtained before a justice

of the peace, and the docket of the justice legally passed into the hands of another justice, and execution issued by the latter justice was levied on property as that of the execution defendant, and proceedings were brought to try the right of property before another justice, on the ground that the one who issued the execution was related to the plaintiff, and, therefore, refused to take jurisdiction.

Held, that where the justice of the peace who issued the execution is disqualified from acting, and has no successor, there is no jurisdiction in any other justice to act. *Test et al. v. Beeson et al.*.....380

L

LIBEL.

1. *Pleading.—Introductory Matter.—Colloquium.—Innuendo.*—Where, in an action for libel, words alleged to have been published are not *per se* actionable, there should be a prefatory allegation of such extrinsic matter, or of such special meaning of the words as renders them libellous, and the *colloquium* should connect therewith the using or publishing of the words complained of, the *innuendo* giving to the words the interpretation borne by them in relation to the extrinsic fact or special meaning. *De Armond v. Armstrong*...35
2. *Same.—Justification.*—Although the truth of the matter charged to be libellous may be shown in defence, yet an answer, in order to make it a good justification, must specifically point out the acts of which the plaintiff was guilty, that the court may see whether the defendant was justified in what he published.....*Ibid.*
3. *Same.—Evidence.*—Where the plaintiff, in such action, has alleged the meaning of certain words, and to whom they referred, he may prove by witnesses what they understood by the words and of whom they were published.....*Ibid.*

LIQUOR LAW.

Appeal.—License.—Where an appeal has been taken to the circuit court or court of common pleas from the ac-

tion of a board of county commissioners in granting or refusing license to sell intoxicating liquors, the decision of such appellate court is final. *Brown et al. v. Porter*.....206

M

MALICE.

See CRIMINAL LAW, 5, 6.

MALICIOUS PROSECUTION.

Defective Affidavit.—In an action for malicious prosecution, the complaint was held not defective, even if the affidavit on which the defendant caused the plaintiff's arrest did not charge a crime, because in that case the defendant was guilty of a trespass in causing the warrant to issue. *Streight v. Bell*.....550

MANDATE.

.See CITY.

MANSLAUGHTER.

See CRIMINAL LAW, 5, 6.

MASTER COMMISSIONER.

See PRACTICE, 1 to 4, 17.

MECHANIC'S LIEN.

1. *Necessary Parties.*—In a suit to enforce a mechanic's lien for the material furnished and labor performed in the erection of a building, where, subsequent to the contract for the work, the owner of the land has sold and conveyed it, he is not a necessary party. *Kellenberger v. Boyer et al.*.....188
2. *Priority over Conveyances.*—The lien of the mechanic relates to the time when the work commenced or the material began to be furnished, and takes priority as well over subsequent conveyances as over subsequent incumbrances*Ibid.*

MINOR.

See CARRIER, 2.

MISTAKE.

See PROMISSORY NOTE, 3.

Misdescription of Land.—Where land has been sold, and the purchaser put into possession, and the purchase-money paid, but an erroneous description of the land has been carried through the bond for a deed into the deed itself, and perpetuated through subdivisions of the land, and resales, in all cases possession being given and the purchase-money paid, equity will grant relief and correct the misdescription upon proper proof. But when, during the transfers, a judicial sale intervenes, and the error is carried into the judgment, the advertisement, the appraisement, the sale, and the sheriff's deed, equity cannot give relief by ordering a correction of the description of a subdivision, at the suit of the purchaser at the sheriff's sale, or those claiming under him. *Rogers v. Abbott et al.*.....138

MORTGAGE.

See HUSBAND AND WIFE, 2, 9;
SCHOOLS, 1.

MURDER.

See CRIMINAL LAW, 1, 3, 5, 6.

N

NATIONAL BANK.

See TAX, 2.

NEGLIGENCE.

See CARRIER, 3; PLEADING, 3, 4.

Railroad.—Street Railroad.—Instructions.—Instructions upon the degree of care to be exercised by the controller of a railway train and the conductor of a street car, at a crossing, are set out and commented upon in the opinion. *The Madison & Indianapolis R. R. Co. v. Taffe*..361

NEW TRIAL.

See PRACTICE, 22.

As of Right. See FRAUD.

1. *Motion for New Trial.*—A motion

for a new trial must be made at the term at which the verdict is rendered, unless for a cause occurring afterward. *McNiel et al. v. Farneman, Treas.*.....203

2. *Grounds for New Trial.*—The rulings of a court upon matters of pleading are not causes for a new trial. *Denman v. McMahon, Adm'r.* 241

3. *Reasons for New Trial.—Too General.*—That the court erred in giving or refusing instructions, or in receiving or rejecting evidence, are reasons too general in their statement to present any question on appeal. The instructions or the evidence should be pointed out. *Waggoner et al. v. Liston*.....357

4. *Same.—Demurrer.*—The ruling on a demurrer is no ground for a new trial.....*Ibid.*

5. *Statement of Cause.*—In a criminal action, the reason for a new trial, that "the court erred in refusing to admit competent and proper evidence offered by the defendant," is too vague and indefinite. The reason should state the evidence offered and refused, or by what witness it was proposed to introduce the evidence. *Cheek et al. v. The State*.....533

O

OFFICIAL BOND.

1. *Demand Before Suit.*—In a suit on a constable's bond for failure to pay over money collected by him, to a justice of the peace, within a month after he has collected the same, no demand on the constable need be alleged or proved. *Nutzenholster et al. v. The State, ex rel. Sumner et al.*.....457

2. *Evidence.—Authenticated Copy.*—An authenticated copy, under section 283 of the code, of a constable's bond, is admissible in evidence without proof of its execution, in a suit on the bond against the administrator of one of the sureties.....*Ibid.*

3. *Judgment.—Irregularity.—Collateral Proceeding.*—In such an action, the officer or his surety cannot object to the original judgment or execution on which the money has been collected by the constable, on account of an irregularity, in that the names

of the plaintiffs are given as a partnership.....*Ibid.*

OPEN AND CLOSE.

See DECEDENTS' ESTATES, 4.

P.

PARTIES.

See CARRIER, 2; CONTRACT, 3; MECHANIC'S LIEN, 1.

PARTITION.

Answer of Division between Heirs.—Suit by F. against Y. and wife for partition. Answer, by the wife, that the land in complaint mentioned, with other lands adjoining them, descended to the defendant and her brother R., from their father; that said brother and herself held all the lands as tenants in common, until during 1864, when, by agreement, part were sold, and the greater portion of the proceeds taken by R.; that on the 27th of February, 1868, she, being with said R. in possession of the lands, conveyed a portion to R., which was his full share, taking into account the money received by R. on sales of the other portions of the lands; that when the conveyance was made, she had no notice of the deed made by R. to the plaintiff, which was executed October 30th, 1865, and not recorded until March 28th, 1868; wherefore neither R. nor the plaintiff have any title to the land.

Held, that the answer was not sufficient. *Younglove et al. v. Frank*—543

PARTNERSHIP.

Mortgagee's Right to Sell Interest of Partner.—*Right of Partners to Subject Partnership Property to Debts.*—The interest of a partner consists of his proportion of whatever balance may ultimately be left after the payment of the partnership debts and settlement of accounts between the partners, and either partner may mortgage such interest in the partnership property, and the mortgagee may sell the same on foreclosure, and the other partners cannot resist such

sale on the ground that the partnership debts exceed the partnership property. The mortgagee is entitled to have the ultimate interest of the mortgagor in the property sold, and the purchaser takes that interest. The sale does not affect the right of the other partners to insist upon the application of the joint property to the payment of the firm debts and to the payment of any balance due them. *Smith v. Evans et al.*.....526

PATENT RIGHT.

See PROMISSORY NOTE, 8.

PAYMENT.

See EVIDENCE, 4.

PLEADING.

See CONTRACT, 17; DEDICATION, 1; DEMURRER; FRAUD, 2; LIBEL, 1, 2, 3; OFFICIAL BOND, 1; PRACTICE, 8, 10, 14, 16; PROMISSORY NOTE, 4, 7, 8, 9; REAL ESTATE, RECOVERY OF, 1, 2; RECOGNIZANCE, 1, 2; RES ADJUDICATA, 1, 2; SLANDER; SPECIFIC PERFORMANCE.

1. *Complaint Containing Defence and Reply.*—It will not render a complaint subject to a demurrer for want of sufficient facts, that after stating a cause of action for goods sold and delivered at the request of and on account of the defendant, it proceeds to anticipate and avoid the defence to the action. *The C., C. & L. R. Co. v. West*.....211
2. *Written Instrument.—Exhibit.—Judgment.*—In a suit on a judgment, it is not necessary to make a copy of the judgment an exhibit to the complaint. *Lytle v. Lytle et al.*.....281
3. *City Ordinance.—Negligence.*—In an action against a railroad company, for an injury caused by negligence in running its cars, a copy of a city ordinance limiting the speed of trains need not be filed with the complaint, to authorize its introduction in evidence; an averment of its existence is sufficient. *The Madison & Indianapolis R. R. Co. v. Taffe*.....361
4. *Same.—Evidence.*—Such an ordinance, under the allegations of such a complaint, was held admissible, to

prove that the defendant was guilty of negligence, and proper for the jury to consider in determining whether the plaintiff was without fault *Ibid.*

POOR PERSON.

See APPEAL.

PRACTICE.

See APPEAL; BASTARDY; CRIMINAL LAW, 4; COUNTY COMMISSIONERS, 1, 2; DEMURRER; ELECTION, 1, 2; FRAUD, 2; INTERROGATORIES TO JURY; JUDGE; JURISDICTION; NEW TRIAL; SUPREME COURT.

1. *Master.—Waiver of Jury.—Oral Consent in Open Court.*—Where the defendant was present by attorney at the reference by the court of a cause to a master commissioner, to inquire and find the facts in the case, and report the same with his conclusions of facts thereon, and complied with an order of the court requiring him to furnish a bill of particulars with the items of account claimed in his answer, and was present also when the report was made and ordered to be spread of record, having entered no objection to the orders at any stage of the proceeding; *Held*, that it was too late for him to demand a jury trial, as the record of these facts disclosed such "oral consent in open court," as shown by the entries "on the record," as amounted to a waiver of a jury trial.
Held, also, that the action of the court in overruling a motion for a trial by jury could only be presented for review in the Supreme Court by a bill of exceptions. *Hauser v. Roth et al.* 89
2. *Bill of Exceptions.—Report of Master.*—Exceptions to a report of a master must be presented on appeal by a bill of exceptions *Ibid.*
3. *Same.—New Trial.—Affidavit.*—Affidavits filed in support of a motion for a new trial must be brought up on appeal by a bill of exceptions *Ibid.*
4. *Judgment.—Exceptions.—Waiver.* Although the report of a master does not authorize the judgment rendered, still, if no exception is taken, the er-

ror is waived *Ibid.*

5. *Agreed Statement of Evidence.*—Where the title of the case is given in an agreement that certain facts shall go to the jury as admitted without the introduction of record evidence thereof, and this is signed by the plaintiffs and some of the defendants, and a defendant whose name is not signed is present in court and does not object to the introduction of the agreement in evidence, he cannot afterward be permitted to make the objection. *Whitehall v. Crawford et al.* 147
6. *Judgment.—Without Relief.—Fraud.*—Where judgment creditors sue to recover of the defendant the value of property fraudulently sold to him by the judgment debtor, to defeat their claims, judgment in their favor cannot be rendered without relief from valuation or appraisement laws *Ibid.*
7. *Same.—Correction.*—Where a judgment by default has been entered for a sum too small, as appears on the face of the papers, through an error of the clerk, the judgment may be corrected, on motion, at a subsequent term, although the amount for which it has been erroneously entered has been paid. *Sherman v. Nixon et al.* 153
8. *Unsound Mind.—Demurrer.—Answer.*—A complaint sought relief from a transaction between the plaintiff and defendant, made when the former was of unsound mind, and there was no averment of a restoration to soundness of mind.
Held, that the court would presume the want of capacity to continue, but that this objection to the complaint would be considered waived unless the want of capacity to sue were presented by demurrer or answer. *Wade v. The State, ex rel. Nix.* 180
9. *Motion to Strike Out.—Bill of Exceptions.*—A refusal to strike out part of a complaint must be presented as error by a bill of exceptions. *The C., C., & L. R. R. Co. v. West.* 211
10. *Demurrer.*—Where a demurrer is sustained to an answer which only amounts to the general denial, it will not be available error, if the general denial be also pleaded *Ibid.*
11. *Immaterial Error.*—Where the action is to recover a money judg-

- ment, and there is a finding for the defendant, the case will not be reversed because an answer in set-off is defective, when the amount claimed in the set-off is so small that the finding for the defendant could not have been upon that answer. *Denman v. McMakin, Adm'r*.....241
12. *Instructions.—Exceptions.*—Where an instruction asked by a party is in writing, signed by the party or his attorney, it thereby becomes part of the record. An exception may be taken to the giving of such instruction, or the refusing to give it, by the words "given (or refused) and excepted to" being written after it and signed by the party excepting or his attorney. If such instruction be so made a part of the record, and the exception be so entered, the instruction need not be authenticated by the signature of the judge or put into a bill of exceptions. *Cross v. Pearson*, 17 Ind. 612, overruled on this question. *The J., M., & I. R. R. Co. v. Cox*325
13. *Same.—Record.*—Where instructions are refused, it will be presumed, the evidence not being in the record, that they were refused because not applicable to the evidence.....*Ibid.*
14. *Pleading.—Striking Out.*—Where the general denial is pleaded in answer, a paragraph of the same answer, only setting up matters that may be given in evidence under the general issue, may be struck out on motion. *Urton et al. v. The State*.339
15. *Affidavits.—Bill of Exceptions.*—Affidavits in support of motions for postponement of trial and for change of venue must be made a part of the record by bill of exceptions. *Kennedy v. The State*.....355
16. *Pleading.—Denial.—Demurrer.*—Where there is a denial of a complaint, it is not error to sustain a demurrer to another paragraph of answer which states facts which simply amount to a denial. *Waggoner et al. v. Liston*.....357
17. *Record.—Report of Master.—Bill of Exceptions.*—A report of a master is no part of the record unless made so by bill of exceptions. *King et al. v. Marsh*.....389
18. *Defective Verdict.*—If a jury find on special questions of fact, in answer to interrogatories, without a general verdict, the finding is of no force, and it is error for the court to dismiss the case thereon, or render judgment thereon for the defendant. *Eudaly v. Eudaly*.....440
19. *Motion to Strike Out.*—A motion to strike out cannot perform the office of a demurrer. *Gorden v. Garr et al.*.....463
20. *Jury.—Communication to.*—While a jury was out deliberating upon a cause, the judge, at his room in a hotel, in the presence of counsel in the cause, prepared written directions for the jury in reference to the sealing of their verdict and separation after the same was made, which directions were then read aloud and sent to the jury without objection; *Held*, that the assent of counsel to the directions would be inferred. *Parmlee et al. v. Sloan et al.*.....469
21. *Striking Out.*—If a paragraph of an answer is properly struck out on motion, as amounting to the general denial, which has been filed as another paragraph, this ruling cannot be made erroneous by a subsequent withdrawal of the general denial. *The I. & C. R. R. Co. v. The State, ex rel. City of Lawrenceburg*489
22. *Motion for New Trial.*—A motion for a new trial must point out the instruction given or refused, or the evidence admitted or rejected, upon which error in the ruling of the court is assigned. *Streight v. Bell*.....550

PRINCIPAL AND AGENT.

See ATTORNEY; EVIDENCE, 8, 9; HUSBAND AND WIFE, 3.

PRINCIPAL AND SURETY.

1. *Indemnifying Bond.—Fraudulent Representation.—Guarantee.*—In an action upon a bond given with surety by one partner to another to indemnify the latter against the partnership liabilities, false and fraudulent representations as to the amount of these liabilities, made to the surety for the purpose of inducing him to execute the bond by the partner to whom the bond was given, it was *held*, would constitute a good de-

fence to the action against such surety. Such representations, without an averment of fraud, will not be sufficient in pleading. Nor will an answer that the party receiving the bond guaranteed that the firm liabilities should not exceed a certain sum be sufficient, no guarantee being contained in the bond. *Fishburn v. Jones*.....119

2. *Release.*—Where a surety on a promissory note, after his release from liability, by an extension of time given to the principal without his consent, receives an indemnity against his liability, without the knowledge of the holder, and subsequently surrenders the same to the principal, he may still avail himself of his discharge. *Rittenhouse v. Kemp et al.*.....258

3. *Same.—Indemnity.—Return of.*—The fact that the surety returned such indemnity, without the knowledge of the holder of the note, at a date anterior to a new extension of time being given without the consent of the surety, does not render the latter liable, where the holder of the note had no information in regard to the indemnity having been given to the surety, when he extended the time of payment.....*Ibid.*

PROCESS.

See ELECTION, 1, 2.

PROMISSORY NOTE.

See CONTRACT, 3, 9; HUSBAND AND WIFE, 1.

1. *Indorser.—Forged Indorsement.*—The acceptance in good faith, from the maker, who is insolvent, of a note with a forged indorsement of the name of the payee, in discharge and payment of a note executed by the same maker, with the genuine indorsement of the same payee, known to the holder as an accommodation indorser, will not discharge such indorser on the original note. *Allen v. Sharpe et al.*.....67
2. *Consideration Paid by Indorsee.*—In an action on a promissory note brought by an indorsee against his indorser, the complaint alleging the insolvency of the maker and the non-

payment of the note, it is not necessary to state the amount paid for the purchase of the note, as, *prima facie*, the face of the note fixes the sum to be recovered. *Lee v. Pile*.....107

3. *Indorsement Without Liability.—Mistake.*—In such an action, an answer that the note was exchanged with the plaintiff for certain property delivered to the defendant, and that he delivered the note to the plaintiff, and then, at his request, and solely for the purpose of parting with any apparent title thereto, he indorsed the same, is no defence to the action, as it does not allege that the plaintiff agreed to take the note without indorsement. The additional averments, that it was expressly agreed that the plaintiff should accept the note under the contract, for the property delivered to the defendant, and should rely on the maker for payment, who was the owner of large property; and that the defendant, being ignorant of the law governing his liability, indorsed the note simply to transfer his ownership, and that it was no part of the agreement that he should be liable as an assignor thereof, and that the words "without recourse" were, by mistake, omitted in making said indorsement, are not sufficient to render the paragraph good, as they contradict the written contract of indorsement.....*Ibid.*
4. *Copy of Indorsement.*—A complaint on a promissory note against the indorsers is not sufficient without a copy of the indorsement, which is the foundation of the action. *Morris et ux. v. Branson*.....195
5. *Assignment.—Evidence.*—In a suit on a promissory note against the maker, brought by one to whom it has been assigned in writing on the back thereof, an answer of general denial puts in issue such assignment, which must be shown in evidence. *Wyant et al. v. Pottorff et al.*....512
6. *Same.—Attorneys' Fees.—Proof of Value.*—Where an agreement is contained in a promissory note to pay attorneys' fees on collection, there must be proof of the value of the attorney's services, to authorize a finding therefor.....*Ibid.*
7. *Pleading.—No Consideration.*—In a suit on a promissory note, by an assignee against the maker, an an-

- swer that the note was executed without any consideration is good. *Johnson v. McCabe et al.*.....535
8. *Patent Right.—False Representation.*—In such an action, an answer that the note was given for a patent right, and that the vendor, the payee, represented that the invention was a new and useful one, and the purchaser, the maker, ignorant as to the truth, made the purchase, relying on said representations, and that the same were false, is a good defence. *Ibid.*
9. *Pleading. — Presumptions of Law.*—A complaint by A., the holder, against B., the maker, on a promissory note, payable at a bank in this State to C., or bearer, need not aver a demand at the bank where payable. Where such complaint shows that the plaintiff is the holder of the note by averring the indorsement thereof to him by one to whom it was transferred by delivery by the payee, the presumption of law, that every holder of negotiable paper is the owner, and that he took it for value, and before dishonor, and in the regular course of business, need not be averred. An answer to such a complaint stating an equitable defence as against the maker is not good without an averment of notice to the plaintiff before he received the note. *Hall v. Allen*.....541

PURDUE UNIVERSITY.

See AGRICULTURAL COLLEGE.

R

RAILROAD.

See CITY; NEGLIGENCE; PLEADING, 3, 4.

Obstructing railroad track. See CRIMINAL LAW, 2.

1. *Injury to Animals.—Onus.*—Where a railroad company seeks to shield itself from liability for stock killed where the road is not fenced, on the ground that it should not be fenced at that point, the onus is on the company to establish that fact. *The Jeff., Mad. & Ind'polis R. R. Co. v. O'Connor*.....95

2. *Highway.—Non-User. — Fencing.* Where a highway has not been in a condition for use by the public, and has not been used for thirty-six years, the presumption of its abandonment is justified, and the right to its full use by the owner is restored, and the duty to fence is imposed on a railroad company using a portion of it for its track.....*Ibid.*
3. *County Commissioners.—Cattle at Large.*—A railroad company is liable for cattle killed where it has not discharged its duty in fencing, although the county commissioners may not have made any order in regard to cattle running at large in the county*Ibid.*
4. *Fencing.—Liability.*—Where the streets and alleys of a town end at a railroad track, and terminate at a high bank, which cannot be used for loading or unloading cars, it is the duty of the railroad company to fence; and it is liable for injury to cattle when it does not fence, without regard to the negligence of the owner of the animals. *The T., W., & W. R. W. Co. v. Cary*.....127
5. *Right of Way Through Streets in City.—Abandonment.*—The Columbus and Shelby Railroad Company procured a right of way to run from the track of the Madison and Indianapolis Railroad Company, through the streets of the city of Columbus, toward Shelbyville, and subsequently, under a running arrangement with said Madison and Indianapolis Railroad Company, gave the control of its road to that company, and, by that company, and with the consent of the Columbus and Shelby Company (the track through the streets still remaining), the road superstructure of the Columbus and Shelby Company adjoining the city was removed for the distance of a mile beyond the city, and the remaining track to Shelbyville was connected with the road of the Madison and Indianapolis Railroad Company around said city, through lands, with the owner of which the latter company contracted to procure a release for him from the Columbus and Shelby Company of the right of way over the land where the superstructure was removed. *Held*, that this did not constitute an

abandonment of the right of the Columbus and Shelby Railroad Company to maintain a track through the streets of Columbus. *City of Columbus et al. v. The Columbus & Shelby R. R. Co.*.....294

6. *Injury to Animals.—Fencing.—Instruction.*—An instruction that when the owner of cattle turns them out, at a place where they must pass along a railway track, when trains are passing, he cannot recover for their injury, is erroneous as applied to a case where the road should be securely fenced and is not so fenced. *The J., M., & I. R. R. Co. v. Ross.* 545

REAL ESTATE, RECOVERY OF.

See HUSBAND AND WIFE, 10.

1. *Pleading.*—A complaint is sufficient in an action for the recovery of real estate, if it contain the substance required by the statute. *Knight et al. v. McDonald et al.*.....463
2. *Same.—Defective Description.*—Where the complaint in an action to recover the possession of real estate described the land as "six — of lot number five," etc., and the finding was "six acres of lot number five," etc.;
Held, that the finding did not cure the defect in the description of the premises in the complaint. *Unversaw v. Myers.*.....487

RECOGNIZANCE.

1. *Suit Upon.—Complaint.*—In a suit upon a recognizance, the complaint must show that the principal in the recognizance was called and defaulted. *Urton et al. v. The State.*....339
2. *Same.*—In a suit upon a recognizance taken before a justice of the peace on a charge for the commission of a felony, the record must show that the forfeited recognizance, with the justice's certificate indorsed thereon, was filed with the clerk of the circuit court.....*Ibid.*

RECORD.

See PRACTICE, 12, 17; RECOGNIZANCE, 2.

REDEMPTION.

See SCHOOLS, 1.

REPLEVIN.

Title to Property.—Suit on Bond.—Where property has been replevied from under a levy by virtue of an execution, and on the trial there has been a finding for the defendant on the issue of title to the property, and a judgment of return has been rendered, the plaintiff cannot afterward defend a suit on the bond, for a failure to deliver the property, by asserting a new title to the property, acquired after the bond in replevin was given and before judgment for a return. *Carr v. Ellis et al.*.....465

RES ADJUDICATA.

1. *Pleading.*—A plea of former adjudication, showing that the questions, things, rights, and matters in suit have been adjudged and tried before and by a tribunal of competent jurisdiction, is good on demurrer. *The State, ex rel. Combs, v. Hudson.*...193
2. *Same.—Jurisdiction of the Person.*—Where the record upon which a plea of former adjudication is based, showing judgment against the defendant by default, only shows service of process on him by recitals in the record, without containing a copy of the notice and return of service, it may be shown that no jurisdiction of the person of the defendant was acquired by proper service.....*Ibid.*

S

SCHOOLS.

See COUNTY AUDITOR, 2.

1. *School Fund.—Mortgage.—Title.—Redemption.*—A purchaser under a sale by virtue of a mortgage to the school fund takes an absolute title, and there is no right of redemption by junior incumbrancers. *Schantz v. Schellhaus, Adm'x.*.....85
2. *School Property.—Part of School Township and School Property Annexed to City.—Title to Property.*—Where real estate is purchased and buildings erected for school purposes,

by the trustees of a school township, with the proceeds of a special school tax, and subsequently the territory embracing such property is annexed to a city, leaving more than half the school township outside the city limits, the title to the school lots and buildings still remains in the trustees of the school township, and the property may be sold by them. *Heizer v. Yohn et al.*.....415

SET-OFF.

See CONTRACT, 5; EVIDENCE, 10.

SHERIFF.

See ESCAPE, 1, 2; FEES AND SALARIES, 2.

SINKING FUND.

1. *Constitution.—Construction.*—The word “invest,” as used in section 4 of article 8 of the constitution, in order to harmonize with section 6 of the same article, must be construed as broad enough to cover loans made by the counties, and that the fund may be intrusted to them for that purpose; and yet, while covering the loan of money, it does not restrict to that mode of investment. *Shoemaker, Aud., et al. v. Smith et al.*.....122
2. *Statute.—Constitutionality.*—The amendatory act of February 24th, 1871, in regard to the sinking fund, is not in conflict with section 4 of article 8 of the constitution.....*Ibid.*
3. *Recital.—Certainty.*—The act of 1871 is sufficiently certain in its recital of the act amended; and the date of the approval of that act is not necessary to be stated in the act amending it; and the court will take judicial notice that there is no other act with the title which is recited. *Ibid.*
4. *Title.*—The title of the amendatory act adds nothing to the title of the original act, and the title of the original act is valid, because it has a single subject sufficiently indicated or expressed; and it embraces the amendments as though they had been, at first, a part of the original act.....*Ibid.*
5. *Mistake.—Intention.*—The use of

the terms, “board of commissioners of the sinking fund,” and “board of sinking fund commissioners,” in the act, does not vitiate the statute, as it is plain what party was intended.....*Ibid.*

6. *Sixth Section.—Fourth Section.*—The original sixth section of the act amended, and the entire amendment of 1871, are valid, with the exception of the fourth section of the amendment, on which no conclusion was reached, as it was not involved in the decision.....*Ibid.*

SLANDER.

1. *Charge of Forgery.—Attempt to Obtain Money by False Pretences.*—The plaintiff, having executed a note to the defendant, November 30th, 1864, and paid one year's interest, after a year had passed executed a mortgage to secure the payment of the note, and some four years later, on discharging the note and mortgage, which were surrendered to the plaintiff, the interest from the date of the note was, by mistake, included, and no credit given for the one year's interest paid. The plaintiff called the attention of the defendant to the mistake afterward, and pointed out the words in the mortgage referring to the note, “Interest paid to Nov. 30th, 1865.” The plaintiff filed a complaint, which, after reciting these facts, and averring that the purpose of defendant was to cause it to be believed, and that the hearers so understood, that the plaintiff had been and was guilty of forgery, and of making use of false pretence, to obtain money, charged, with proper innuendo, that defendant had uttered and published of him the following false and slanderous words: “You forged it; inserted it; put it in. You wrote that clause in it. I would swear that that line in the mortgage was not in the mortgage when I gave it to you yesterday, and you put it in. You altered the mortgage, changed the mortgage, put that line in the mortgage, inserted that line, put the credit in, and you are a forger and committed forgery;” and also: “He committed forgery; is a forger; is guilty of forgery. There is something here that I don't understand;

this line has been put here; or at least if I was called on to swear, I would swear that I read the whole of the mortgage over very carefully, and I did not read that. I let Hotchkiss (the plaintiff) have the mortgage once, and I never noticed that until after he brought it back. It is his handwriting. I told him so. I suppose he says he is going to sue me for it, but it is my belief. He can't hurt a person for his belief. Hotchkiss is so slippery, I have had to watch him. He cheated me out of some money, which he positively agreed to pay, and I am not going to let him cheat me any more. I am positive this was not here when I gave him the mortgage. He put it there; it is his handwriting; I told him so; he can't hurt me for that. He can't hurt a man for his opinion, unless he says he can prove it. I have never said I could prove it. He must have put that line in the mortgage. I am certain it was not there when I gave him the mortgage."

- Held*, that the entry charged, on the mortgage, had the force and effect of a receipt for so much money, and, although surrendered, was a valid instrument as such receipt, and capable of being forged, and the paragraph showed a charge by defendant against plaintiff of forgery. It did not state a charge of obtaining money by false pretences. The attempt charged was not a crime. *Hotchkiss v. Olmstead*.....74
2. *Same*.—A second paragraph charged a conversation in respect to the same transaction, but it alleged the alteration was made before execution and delivery of the mortgage, and, therefore, no forgery could have been then committed..... *Ibid*.

SPECIFIC PERFORMANCES.

Pleading.—*Performance by Plaintiff*. Suit by the widow and heirs of A. to enforce specific performance of a contract between A. and the defendant, for the conveyance by the latter to the former of certain real estate, on condition that A. should pay certain sums to the defendant at certain dates thereafter, and upon the further condition that A. should, at said

dates, pay defendant any money that might then be due to the defendant from A., and which might be advanced to A., or on his account, by the defendant, after the making of the contract. The complaint alleged the making of said contract and set it out, and alleged the death of A., and that the plaintiffs were his widow and children, distinguishing which was the widow and which were the children, and alleged full payment and full compliance by A., and that plaintiffs had demanded a deed, which defendant refused to execute. *Held*, that the complaint was good on demurrer. *Hauser v. Roth et al.* 89

STARE DECISIS.

Rule of Construction.—A long line of uniform decisions construing a statute, in the face of the fact that the legislature for a long series of years has acquiesced in such construction, cannot, with judicial propriety, be disregarded or lightly treated. *Lab et al. v. Mathis*.....309

STATUTE OF FRAUDS.

1. *Parol Promise to Answer for Debt of Another*.—G. held a note against S., and J. held a note and mortgage against G., and it was agreed between J. and H. that J. was to surrender to G. the note and mortgage and release him from that indebtedness, and take from him an assignment of the note which he held against S., and H. agreed by parol to pay to J. the latter note. J. accordingly did release the note and mortgage against G., and took an assignment from G. of the note against S.

Held, that the contract was within the statute of frauds, which requires a special promise to answer for the debt of another to be in writing, in order that an action may be maintained thereon. *Crosby et al. v. Jeroloman*264

2. *Agreement to Convey Land*.—A suit cannot be maintained by a husband on a verbal contract by which land was to be conveyed as a compensation for services rendered by his wife, for the value of the land, on failure to convey. *Baxter v. Kitch, Adm'r*554

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SUNDAY.

Contract.—A contract of insurance made on Sunday, and not subsequently ratified, is void. *Heller, Receiver, v. Crawford*..... 279

SUPREME COURT.

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1. *Practice. — Appeal. — Evidence.*—To justify the Supreme Court in reversing a judgment, error must affirmatively appear by the record. If evidence excluded might have been objectionable as irrelevant under the issues, or under the evidence, it will be presumed to have been properly excluded, where none of the evidence is in the record. *Hunter v. Thomas*.....145
2. *Bill of Exceptions.*—Where there is no bill of exceptions in the record, and the reasons for a new trial are that the finding is contrary to law, and that the finding is contrary to the evidence, such reasons cannot be examined by this court on appeal. *Rettig v. Pefferman et al.*.....240
3. *Assignment of Error.*—The assignment of the reasons for a new trial as error presents no question in the Supreme Court. The overruling of the motion for a new trial should be assigned, simply. *Ferrenburg et al. v. The Studabaker Turnpike Co. et al.*.....251
4. *Same.*—No question is presented in the Supreme Court by the assignment as error of a reason for a new trial in the court below. *Conner v. Wall*.....252
5. *Notice to Co-Parties.*—Where all co-parties do not join in an appeal to the Supreme Court, notice must be served on those not joining, and proof thereof must be made, or the court will dismiss the appeal. *Knarr v. Conway et al.*.....257
6. *Amendment of Record.*—A record cannot be amended or defects sup-

plied in the Supreme Court by affidavit. *Lytle v. Lytle et al.*.....281

7. *Weight of Evidence.*—That the finding is against the weight of evidence, is no ground for reversing a judgment. *Waggoner et al. v. Liston*.....357
8. *Reversal on Evidence.—Rule Upon Motion for New Trial.*—A judgment will not be reversed upon the mere weight of evidence, by the Supreme Court, unless upon a material point upon which the evidence is all documentary. Where there is evidence, which, if it were uncontradicted, would be sufficient to support the finding, the judgment will not be reversed on the evidence. This rule must not be applied in the court trying the cause. *The Madison and Ind'polis R. R. Co. v. Taffe*.....361

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TAX.

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1. *Lien. — Levy of Execution.*—When the treasurer of a county acquires a lien for taxes on personal property, by the duplicate coming into his hands, his lien is superior to an execution subsequently levied. *McNiel et al. v. Farneman, Treasurer*.....203
2. *Municipal Purposes. — National Banks.*—A tax on the capital stock of a national bank, for school purposes, or for a donation by a township to aid in building a railroad, is not a tax levied for municipal purposes, within the meaning of the ninth section of the act of March 15th, 1867, 3 Ind. Stat. 34. *Root v. Erdelmeyer, Treasurer, et al.*.....225
3. *County Treasurer. — Delinquent Taxes.*—The treasurer of a county is not authorized to levy upon personal property for the non-payment of taxes, before the third Monday in March, unless he have such evidence that the debtor is about to leave the county, without payment of his taxes, as would satisfy a jury that he had cause to fear such a course. Any levy by the treasurer before such date, and without sufficient cause, renders him liable for conversion. *Veit et al. v. Graff*.....253

TOWN.

Trustees of Towns.—Election.—Inspector.—Injunction.—Where the inspector of an election for town trustees did not, within ten days after said election, or at any other time after said election, over his own signature, certify and file in the clerk's office of the circuit court of the county where the election was held, a certificate certifying the several persons elected at said election, to fill the several offices of said town; *Held*, that an ordinance passed by the persons so elected gave no authority for an improvement in the town at the expense of the property holders, and that an injunction should be granted on their application. *Dinwiddie et al. v. The President, etc., of Rushville et al.*.....66

TRESPASS.

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Damages.—Where a complaint for trespass upon real estate avers a consequential injury to personal property, such averment will be taken only as a matter of aggravation of the damages. *Loeb et al. v. Mathis.*306

TRUST.

1. *Parol Evidence.*—To establish a resulting trust in lands in favor of creditors, the terms of the agreement must be clearly and satisfactorily shown, and parol evidence to establish the same in opposition to the terms of a written conveyance should be received with caution. *Parmlee et al. v. Sloan et al.*.....469
2. *Innocent Purchaser.*—A person who purchases real estate from one who bought at a sale on execution cannot be bound or affected by any agreement or trust, of which he had no notice or knowledge, between his vendor and the judgment debtor. *Ibid.*

TURNPIKE.

Failure to Assess all Lands Liable.—A complaint for an injunction to restrain the collection of assessments on land within one and one-half miles

of a certain turnpike road, for benefits conferred by the construction of the same, alleged that there were more than twenty thousand acres of land thus liable, and that only thirteen thousand acres had been returned on the list by the assessors.

Held, that the complaint was good on demurrer for want of sufficient facts. *Forgey et al. v. The Northern Gravel Road Co. et al.*.....118

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1. *Covenant.—Evidence.*—In an action for breach of a covenant of seizin, where the complaint alleged that the title to the land described in the deed was in the United States; *Held*, that the deposition of a register of the land office of the district in which the land lay was competent evidence to prove the title. *Lacy et al. v. Marnan.*.....168
2. *Same.—Measure of Damages.*—The measure of damages on the breach of the covenant of seizin, where the grantee receives no title, is the consideration money paid, with interest, or if land be paid by way of exchange, the value of that land. *Ibid.*

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1. *Declarations of Testator.—Mental Capacity.*—The declarations of a testator, made at any other time than when engaged in the execution of his will, are not to be considered by a jury, except on the question of mental capacity to make the will. *Hayes et al. v. West et al.*.....21
2. *Subscribing Witnesses.—Evidence.* If a competent subscribing witness to a will states that he and another competent witness, or other competent witnesses, subscribed the instrument in the presence of the testator and at his request, the attestation is sufficiently proved.....*Ibid.*

3. *Subsequent Issue.—Revocation.*—The birth of a child of a testator, after the execution of the will, works an entire revocation of the will, unless provision shall have been made in such will for such issue. *Hughes v. Hughes*.....183
4. *Undue Influence.—Wife.*—An influence in procuring the execution of a will, which when exercised by a wife is lawful and proper, may be illegitimate and undue when exercised by a woman living in unlawful intercourse with the testator. *Kessinger et al. v. Kessinger et al.* 341

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END OF VOLUME XXXVII.

E.

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